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No. 6405

United States Circuit Court of Appeals

For the Ninth Circuit.

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6405

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. E. B. SEABROOK, Concord Building, Portland, Oregon, and Mr. C. T. HAAS, Pacific Building, Portland, Oregon,
For the Appellant.

HUNTINGTON, WILSON & HUNTINGTON, Porter Building, Portland, Oregon, and CLARK & CLARK, Yeon Building, Portland, Oregon,
For the Appellee.

In the District Court of the United States for the District of Oregon.

No. L.–10,465.

HENRY HEINE,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant.

CITATION ON APPEAL.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

To New York Life Insurance Company, a Corporation, Defendant Above Named, and to Messrs. Clark and Clark, and to Huntington, Wilson and Huntington, your attorneys herein, GREETING:

WHEREAS the plaintiff above named has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon, in your favor, on December 1, 1930, and has given the security required by law,—

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said judgment should not be reversed or corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 29th day of January, in the year of our Lord one thousand nine hundred and thirty-one.

JOHN H. McNARY,
Judge.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely legal service by copy of the within and foregoing citation on appeal is hereby admitted at Portland, Oregon, this 29 day of January, 1931.

B. S. HUNTINGTON,
Of Attorneys for Defendant Above Named.

[Endorsed]: Filed Jan. 29, 1931. [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Circuit Court of the State of Oregon for the County of Multnomah.

HENRY HEINE,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

COMPLAINT.

Comes now the plaintiff and for his cause of action against the defendant complains and alleges as follows:

I.

That at all times hereinafter mentioned the defendant, New York Life Insurance Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of Oregon as a foreign corporation in compliance with the laws of the State of Oregon.

II.

That the business of the defendant corporation among other things is and was during all times herein mentioned the authorized issuance of life insurance policies in their various forms in the State of Oregon, the United States and the former Empire of Germany, now the Republic of Germany.

III.

That on or about November 11th, 1911, upon the

application of the plaintiff to the defendant corporation at its office in Berlin, Germany, and in consideration of the payment by the plaintiff of an annual premium of Three Thousand Five Hundred Thirty-nine (3539) Marks, German legal tender, and in further consideration of a similar premium to be paid annually on or before November 10th of each succeeding year during the continuance of the policy issue to the plaintiff its life insurance policy being policy number 4648275, a true and correct translation of said policy marked Exhibit "A" being hereto attached and by this reference made a part hereof. [3]

IV.

By said policy number 4648275 defendant agreed, in consideration of the payment of annual premiums as aforesaid, to insure the life of the plaintiff, in the sum of One Hundred Thousand Marks (Mks. 100,000), legal tender of Germany, for the period beginning with noon, November 10th, 1911, and defendant agreed to pay the above amount at its office at Berlin, Germany, to the wife of the insured plaintiff herein, and, in case of her decease, to the lawful heirs of the plaintiff in the event that the death of the plaintiff occurred while the policy was in force.

V.

That said policy further provided that after two full annual premiums had been paid that a certain fixed cash value attached thereto. This amount of cash value increased with each annual premium and on November 10th, 1922, the cash value of said

policy as fixed by the defendant company was 21,-100 marks, which said amount was payable to the plaintiff at his option on demand. Plaintiff at this time exercises his option and demands the payment of said 21,100 marks and herewith offers the surrender of said policy to the defendant.

VI.

That the plaintiff herein duly performed all the conditions of said policy by him to be performed up to and including the payment of the premium due November 10th, 1922, and duly paid to the defendant the annual premiums of 3,539 Marks, legal tender of Germany, each year during the entire life of the policy up to November 10th, 1922, and performed each and every condition or covenant to be performed by him. That on or about November 10, 1922, the defendant herein discontinued its offices and business in Germany and refused to accept further premiums from the plaintiff, at said time said defendant refused to further carry out the contract between the parties hereto. [4]

VII.

That there was no debt to the defendant outstanding on said policy on November 10th, 1922, nor has any debt been incurred thereon since that date.

VIII.

That on November 10th, 1922, and thereafter plaintiff was and still is alive and demanded the payment due under said policy but said defendant at that time refused said payments and has at all times since said date refused payment of the

amounts due plaintiff under and by virtue of the terms of said policy.

IX.

That the exchange value of one German mark, the medium of exchange specified in said policy, on November 10th, 1911, was not less than twenty-three and eighty-five hundredths cents ($.2385).

X.

That the present exchange value of one German mark to-day is not less than twenty-three and eighty-five hundredths cents ($.2385).

XI.

That there is now due and owing from the defendant to the plaintiff herein by reason of said contract the sum of 21,100 German Marks (Mks. 21,100), or ($5,032.00) Five Thousand Thirty-two Dollars, its equivalent in United States money, for the amount due on said policy on November 10th, 1922.

XII.

That the sum of One Thousand Dollars is a reasonable sum to be allowed plaintiff herein as and for his attorney's fee in this action.

For a further, separate and second cause of action against the defendant, the plaintiff alleges: [5]

I.

That at all times hereinafter mentioned the defendant, New York Life Insurance Company, was and now is a corporation organized and existing un-

der and by virtue of the laws of the State of New York and doing business in the State of Oregon as a foreign corporation in compliance with the laws of the State of Oregon.

II.

That the business of the defendant corporation, among other things, is and was during all times herein mentioned the authorized issuance of life insurance policies in their various forms in the State of Oregon, the United States and the former Empire of Germany, now the Republic of Germany.

III.

That on or about November 11th, 1911, upon the application of the plaintiff to the defendant corporation at its office in Berlin, Germany, and in consideration of the payment of the plaintiff of an annual premium of Three Thousand Five Hundred Thirty-nine (3539) Marks, German legal tender, and in further consideration of a similar premium to be paid annually on or before November 10th of each succeeding year during the continuance of the policy, issue to the plaintiff its life insurance policy, being policy number 4648274, a true and correct copy of translation of said policy marked Exhibit "A" being hereto attached and by this reference made a part hereof, the only difference between the policy set forth under Exhibit "A" in the first cause of action and the policy herein being the number of said policy.

IV.

By said policy number 4648274 defendant agreed, in consideration of the payment of annual pre-

miums as aforesaid, to insure the life of the plaintiff, in the sum of One Hundred Thousand Marks (Mks. 100,000), legal tender of Germany, for the period beginning with noon, November 10th, 1911, and defendant agreed to pay the above amount at its office at Berlin, Germany, to the wife [6] of the insured plaintiff herein, and, in case of her decease, to the lawful heirs of the plaintiff in the event that the death of the plaintiff occurred while the policy was in force.

V.

That said policy further provided that after two full annual premiums had been paid that a certain fixed cash value attached thereto. This amount of cash value increased with each annual premium and on November 10th, 1922, the cash value of said policy as fixed by defendant company was 21,100 marks, which said amount was payable to the plaintiff at his option on demand. Plaintiff at this time exercises his option and demands the payment of said 21,100 marks and herewith offers the surrender of said policy to the defendant.

VI.

That the plaintiff herein duly performed all the conditions of said policy by him to be performed up to and including the payment of the premium due November 10th, 1922, and duly paid to the defendant the annual premiums of 3,539 marks, legal tender of Germany, each year during the entire life of the policy up to November 10th, 1922, and performed each and every condition or covenant to be performed by him. That on or about November

10th, 1922, the defendant herein discontinued its offices and business in Germany and refused to accept further premiums from the plaintiff, at said time said defendant refused to further carry out the contract between the parties hereto.

VII.

That there was no debt to the defendant outstanding on said policy on November 10th, 1922, nor has any debt been incurred thereon since that date.

VIII.

That on November 10th, 1922, and thereafter plaintiff [7] was and still is alive and demanded the payment due under said policy but said defendant at that time refused said payments and has at all times since said date refused payment of the amounts due plaintiff under and by virtue of the terms of said policy.

IX.

That the exchange value of one German mark, the medium of exchange specified in said policy, on November 10th, 1911, was not less than twenty-three and eighty-five hundredths cents ($.2385).

X.

That the present exchange value of one German mark to-day, is not less than twenty-three and eighty-five hundredths cents ($.2385).

XI.

That there is now due and owing from the defendant to the plaintiff herein by reason of said contract the sum of 21,100 German Marks (Mks.

21100), or Five Thousand Thirty-two ($5,032.00) Dollars, its equivalent in United States money, the amount due on said policy on November 10th, 1922.

XII.

That the sum of One Thousand Dollars is a reasonable sum to be allowed plaintiff herein as and for his attorney's fee in this action.

For a further, separate and third cause of action against the defendant, the plaintiff alleges:

I.

That at all times hereinafter mentioned the defendant, New York Life Insurance Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of Oregon as [8] a foreign corporation in compliance with the laws of the State of Oregon.

II.

That the business of the defendant corporation, among other things, is and was during all the times herein mentioned the authorized issuance of life insurance policies in their various forms in the State of Oregon, the United States and the former Empire of Germany, now the Republic of Germany.

III.

That on or about November 11th, 1911, upon the application of the plaintiff to the defendant corporation at its office in Berlin, Germany, and in consideration of the payment by the plaintiff of an annual premium of Seven Thousand Seventy-

eight (7078) Marks, German legal tender, and in further consideration of a similar premium to be paid annually on or before November 10th of each succeeding year during the continuance of the policy issue to the plaintiff its life insurance policy being policy number 4648273, a true and correct translation of said policy marked Exhibit "A" being hereto attached and by this reference made a part hereof. The only difference between the policy set forth under Exhibit "A" in the first cause of action and the policy herein being the number of said policy and the amount of the principal of the insurance on the face of the policy and in the table of cash value. Policy number 4648273 being in the sum of 200,000 Marks, German legal tender and in the table of cash value the figure 100,000 is replaced by the figure 200,000 and the figure 100 is replaced by the figure 200.

IV.

By said policy Number 4648273 defendant agreed, in consideration of the payment of annual premiums as aforesaid, to insure the life of the plaintiff, in the sum of Two Hundred Thousand Marks (Mks. 200,000), legal tender of Germany, for the period [9] beginning with noon, November 10th, 1911, and defendant agreed to pay the above amount at its office in Berlin, Germany, to the wife of the insured plaintiff herein, and, in case of her decease to the lawful heirs of the plaintiff in the event that the death of the plaintiff occurred while the policy was in force.

V.

That said policy further provided that after two full annual premiums had been paid that a certain fixed cash value increased with each annual premium and on November 10th, 1922, the cash value of said policy as fixed by the defendant company was 42,200 Marks, which said amount was payable to the plaintiff at his option on demand. Plaintiff at this time and herewith offers the surrender of said policy to the defendant.

VI.

That the plaintiff herein duly performed all the conditions of said policy by him to be performed up to and including the payment of the premium due November 10th, 1922, and duly paid to the defendant the annual premiums of 7,078 Marks, legal tender of Germany, each year during the entire life of the policy up to November 10th, 1922, and performed each and every condition or covenant to be performed by him. That on or about November 10th, 1922, the defendant herein discontinued its offices and business in Germany and refused to accept further premiums from the plaintiff, and at said time said defendant refused to further carry out the contract between the parties hereto.

VII.

That there was no debt to the defendant outstanding on said policy on November 10th, 1922, nor has any debt been incurred thereon since that date.

VIII.

That on November 10th, 1922, and thereafter plaintiff was and still is alive and demanded the payment due under [10] said policy, but said defendant at that time refused said payments and has at all times since said date refused payment of the amounts due plaintiff under and by virtue of the terms of said policy.

IX.

That the exchange value of one German mark, the medium of exchange specified in the said policy, on November 10th, 1911, was not less than twenty-three and eighty-five hundredths cents ($.2385).

X.

That the present exchange value of one German mark, to-day, is not less than twenty-three and eighty-five hundredths cents ($.2385).

XI.

That there is now due and owing from the defendant to the plaintiff herein by reason of said contract the sum of 42,200 German marks (Mks. 42200), or Ten Thousand Sixty-four ($10.064) Dollars, its equivalent in United States money, the amount due on said policy on November 10th, 1922.

XII.

That the sum of Two Thousand Dollars is a reasonable sum to be allowed plaintiff herein as and for his attorney's fee in this action.

WHEREFORE, plaintiff asks for a judgment against the defendant for the sum of $5,032.00; for

the further sum of $1,000.00; for the further sum of $5,032.00; for the further sum of $1,000.00; for the further sum of $10,064; for the further sum of $2,000.00; together with interest upon each of the above-named sums at six per cent (6%) per annum from November 10th, 1922, until paid, together with his costs and disbursements herein.

C. T. HAAS,
Attorney for Plaintiff. [11]

County of Multnomah,
State of Oregon,—ss.

I, C. T. Haas, being first duly sworn, depose and say that I am one of the attorneys for the plaintiff in the above-entitled case, that the foregoing complaint is true as I verily believe, and that I am making this verification by reason of the fact that the plaintiff is not within the County of Multnomah, State of Oregon, by reason of the fact that the within action is based upon documents which are in my possession.

C. T. HAAS.

Subscribed and sworn to before me this 22d day October, 1928.

[Notarial Seal] IDA BELLE TREMAYNE,
Notary Public for Oregon, at Portland.

My commission expires: 7/10/32.

[NOTE: Exhibit "A" attached to complaint will be found at pages 96–116.] [12]

In the Circuit Court of the State of Oregon for the County of Multnomah.

HENRY HEINE,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

PETITION FOR REMOVAL.

To the Honorable Circuit Court of the State of Oregon, for Multnomah County:

Your petitioner, New York Life Insurance Company, a corporation, respectfully shows to this Honorable Court:

I.

That this is an action at law brought by said plaintiff against this defendant to recover upwards of Twenty Thousand ($20,000.00) Dollars, exclusive of interest and costs, and that the matter in dispute and the amount in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs. That there is a controversy between the parties to this suit, defendant controverting and denying each and every part of each cause of action set up in the complaint in the action, and said action was duly filed and commenced and is now pending in this court. That this cause is one of a civil nature, of which the District Courts of the United States have original jurisdiction.

II.

At the time of the commencement of this action your petitioner, the above-named defendant, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of said state. At the time of the commencement of this action the plaintiff was and still is a citizen, subject and resident of the Republic of Germany and a nonresident in the state of Oregon.

III.

That the time within which the defendant is required to [29] answer by the laws of Oregon has not yet expired, service having been made upon the defendant in Multnomah County on or about the 23d day of October, 1928.

IV.

Your petitioner herewith offers a good and sufficient bond and surety for its entering in the District Court of the United States for the District of Oregon, within thirty (30) days from the date of the filing of this petition, a copy of the record in this action and for paying all costs and disbursements that may be awarded by said District Court of the United States if said Court shall hold that this action was wrongfully or improperly removed.

WHEREFORE your petitioner prays that this Honorable Court proceed no further herein except to make the proper and usual order of removal, as required by law, and to accept the said bond and surety and cause the record herein and this action

to be removed to the District Court of the United States for the District of Oregon.

NEW YORK LIFE INSURANCE COMPANY.

By R. A. DURHAM,
Its Attorney-in-fact for Oregon,
Petitioner.

CLARK, SKULASON & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Petitioner. [30]

State of Oregon,
County of Multnomah,—ss.

R. A. Durham, being first duly sworn, deposes and says: That I am the attorney-in-fact for Oregon for the above-named petitioner; that the foregoing petition is true, to my own knowledge, except as to matters therein stated on information and belief, and as to those matters I believe it to be true.

R. A. DURHAM.

Subscribed and sworn to before me this 31st day of October, 1928.

[Notarial Seal] WALTER M. HUNTINGTON,
Notary Public for Oregon.

My commission expires March 4, 1932.

State of Oregon,
County of Multnomah,—ss.

On this 31 day of October, 1928, in said county and state, before me, a notary public in and for said county and state, personally R. A. Durham, to

me well known to be the individual who executed the foregoing petition for and in behalf of the said defendant, and acknowledged to me that he executed the same.

[Notarial Seal] WALTER M. HUNTINGTON,
Notary Public for Oregon.

My commission expires Mar. 4, 1932. [31]

Due and legal service of the foregoing petition for removal upon me at Portland, Oregon, this 31 day of October, 1928, is here acknowledged.

C. T. HAAS,
Attorney for Plaintiff.

[Endorsed]: Filed November 2, 1928. [32]

BE IT REMEMBERED, that at a regular term of the Circuit Court of the State of Oregon, for the County of Multnomah, begun and held at the County Courthouse in the City of Portland, in said county and state, on Monday, the 1st day of October, A. D. 1928, the same being the first Monday in said month, and the time fixed by law for holding a regular term of said court.

Present, Hons. JACOB KANZLER, ROBERT G. MORROW, ROBERT TUCKER, JOHN H. STEVENSON, LOUIS P. HEWITT, WALTER H. EVANS, GEORGE TAZWELL and W. A. EKWALL, Judges.

Whereupon, on this Friday, the 2d day of November, A. D. 1928, the same being the 28th judicial

day of said term of said court, among other proceedings the following was had, to wit:

[Title of Court and Cause—No. N.–619.]

ORDER FOR REMOVAL.

This defendant having presented to this Court a sufficient petition for removal of this cause to the District Court of the United States, for the District of Oregon, and a bond with sufficient surety upon removal;

And it appearing that the plaintiff has been given due and timely notice of the time and place for a hearing upon said petition,—

IT IS ORDERED, that said petition is sufficient in substance and form, and is hereby allowed, and that the bond for removal is accepted and approved, that this Court proceed no further in this cause, and that it be and is hereby removed to the District Court of the United States for the District of Oregon.

Dated this 2d day of November, 1928.

JACOB KANZLER,
Judge.

374/270 [33]

AND AFTERWARDS, to wit, on the 18th day of April, 1929, there was duly filed in said court an answer, in words and figures as follows, to wit: [35]

[Title of Court and Cause—No. L.–10,465.]

ANSWER.

Now comes defendant, and for its ANSWER TO THE FIRST CAUSE OF ACTION in plaintiff's complaint contained:

I.

Admits that at all times in said first cause of action and herein mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and for many years last past was and now is doing business in the State of Oregon as a foreign insurance company pursuant to the provisions of Chapter 203 of the 1917 General Laws of Oregon.

II.

Admits that during all the times in said first cause of action and herein mentioned the defendant was authorized to issue policies of life insurance in various forms, and that the business of the defendant, in part, was the issuance of life insurance policies. Admits that it was authorized to issue, and did issue, life insurance policies in the State of New York, within the United States. Denies that it was authorized to issue, or at any time issued, life

insurance policies or other policies of insurance in any part of the United States [36] other than in the State of New York. Admits that prior to August 1, 1914, it was authorized to issue, and did issue, life insurance policies in the Empire of Germany, under and in accordance with the laws thereof. Denies that it issued any policies of life insurance or other forms of insurance, in the Empire, or its successor, the Republic, of Germany, subsequent to August 1, 1914.

III.

Admits and alleges that prior to November 10, 1911, one Henry Heine made written application to the defendant for a life insurance policy. In this connection alleges that said application was made at the office of the defendant in Berlin, Germany, on or about the 10th day of October, 1911. Admits that on November 10, 1911, the defendant, at its office in Berlin, Germany, issued to one Henry Heine, then and at all times thereafter a resident and citizen of Germany and a resident of Berlin, therein, a life insurance policy No. 4648275, in consideration of the payment by him to the defendant of the first annual premium of 3,539 marks of the currency of the German Empire, and the terms and covenants in said policy of insurance to be kept and performed by the insured. Said policy was written and issued in the German language, and a correct translation thereof into the English language is hereto attached, marked Exhibit 1, and made a part of this answer. Denies each and every other allega-

tion contained in Paragraph III of the said first cause of action.

IV.

Admits that defendant by said policy of insurance insured the life of Henry Heine, therein mentioned, in the sum of 100,000 marks, as in said policy specified, and agreed [37] to make payment in the amounts and upon the terms and conditions in said policy stated, to which reference is hereby made. Denies each and every other allegation contained in Paragraph IV of said first cause of action.

V.

Admits that, as provided in said policy to which reference is hereby made, it had a fixed cash surrender value two years after the payment of the first annual premium. Admits that, as provided in said policy, the cash surrender value increased thereafter with each annual premium paid. Denies each and every other allegation contained in Paragraph V of said first cause of action.

VI.

Admits that the insured paid the annual premium on said policy of insurance up to and including the annual premium due and payable November 10, 1921, which, being payable in advance, would pay the premium accruing upon said insurance up to November 10, 1922. Denies each and every other allegation contained in Paragraph VI of the first cause of action.

VII.

Admits Paragraph VII of the first cause of action.

VIII.

Answering Paragraph VIII of the first cause of action, the defendant avers that it has not any knowledge or information sufficient to form a belief as to whether on November 10, 1922, the plaintiff was alive, and therefore denies the same. Defendant further avers that it has not any knowledge or information sufficient to form a belief as to whether the plaintiff is now alive, and therefore denies the same. Denies each and every other allegation contained in said Paragraph VIII of the first cause of action. [38]

IX.

Denies each and every allegation contained in Paragraph IX of said first cause of action. In this connection defendant avers that on or about the date when said policy of insurance was issued, and thereafter until the great depreciation in the mark currency of the German Empire, and its successor, the Republic of Germany, during and following the World War, 23.85 cents of the currency of the United States would usually purchase in the open market one mark of the German currency in which said policy was payable, and one mark of such currency, during said times, would usually buy on the open market approximately 23.85 cents of the currency of the United States. That in August, 1924, a new currency was created and established by the Republic of Germany, the unit of which was and

is the Reichsmark. That, subject to small market fluctuations, one Reichsmark usually can be purchased in the open market for about 23.85 cents of United States currency, and conversely 23.85 cents of the United States currency, subject to said fluctuations, will usually purchase one Reichsmark. That the mark currency in which the said policy of insurance was payable had greatly depreciated prior to August, 1924, and said currency was stabilized by the Republic of Germany in August, 1924, on the following basis: One million million marks of the old mark currency in which the policy was payable was made the equivalent in value of one Reichsmark of the new currency established in August, 1924.

X.

Denies each and every allegation contained in Paragraph X of the said first cause of action. In this connection defendant alleges that one Reichsmark of the currency provided for by the German Monetary Act of August 30, 1924, subject to minor market fluctuations, was worth at the time this action was commenced, and now is worth on the open market approximately 23.85 cents in American currency. [39]

XI.

Denies each and every allegation contained in Paragraph XI of said first cause of action. In this connection the defendant further alleges that on November 10, 1922, and at all times thereafter, the mark currency in which said policy of insurance was payable had depreciated to a point where it was

practically valueless; that the amounts called for by said policy of insurance, if the same had been in force on November 10, 1922, and thereafter, were payable lawfully by the payment of the number of marks therein specified in said depreciated currency. On August 30, 1924, the German Republic established a new currency, the unit of which was and is the Reichsmark. From and after August 30, 1924, the mark currency in which the said contract of insurance was written and was payable, if the same was in force and anything due thereunder, had an actual stabilized value of one million million of said old or depreciated marks to one Reichsmark, and from and after August 30, 1924, all contracts payable in the old or depreciated mark, including the said contract of insurance, were payable in Reichsmarks on the basis of one of the latter for one million million of the former.

XII.

Denies that the sum of $1,000.00, or any sum, is a reasonable sum to be allowed to the plaintiff herein as attorneys' fees, and denies that the plaintiff is entitled to recover any sum whatsoever as attorneys' fees in this action. [40]

Now comes the defendant, and for its ANSWER TO THE SECOND CAUSE OF ACTION in plaintiff's complaint contained:

I.

Admits that at all times in said second cause of action and herein mentioned the defendant was,

and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and for many years last past was and now is doing business in the State of Oregon as a foreign insurance company pursuant to the provisions of Chapter 203 of the 1917 General Laws of Oregon.

II.

Admits that during all the times in said second cause of action and herein mentioned the defendant was authorized to issue policies of life insurance in various forms, and that the business of the defendant, in part, was the issuance of life insurance policies. Admits that it was authorized to issue, and did issue, life insurance policies in the State of New York, within the United States. Denies that it was authorized to issue, or at any time issued, life insurance policies or other policies of insurance in any part of the United States other than in the State of New York. Admits that prior to August 1, 1914, it was authorized to issue, and did issue, life insurance policies in the Empire of Germany, under and in accordance with the laws thereof. Denies that it issued any policies of life insurance, or other forms of insurance, in the Empire, or its successor, the Republic, of Germany, subsequent to August 1, 1914.

III.

Admits and alleges that prior to November 10, 1911, one Henry Heine made written application to the defendant for [41] a life insurance policy. In this connection alleges that said application was made at the office of the defendant in Berlin, Ger-

many, on or about the 10th day of October, 1911. Admits that on November 10, 1911, the defendant, at its office in Berlin, Germany, issued to one Henry Heine, then and at all times thereafter a resident and citizen of Germany and a resident of Berlin, therein, a life insurance policy No. 4648274, in consideration of the payment by him to the defendant of the first annual premium of 3,539 marks of the currency of the German Empire, and the terms and covenants in said policy of insurance to be kept and performed by the insured. Said policy was written and issued in the German language. That said policy is similar in terms with policy No. 464-8275, copy of which is attached hereto as Exhibit 1, except as to the number thereof. Denies each and every other allegation contained in Paragraph III of the said second cause of action.

IV.

Admits that defendant by said policy of insurance insured the life of Henry Heine, therein mentioned, in the sum of 100,000 marks, as in said policy specified, and agreed to make payment in the amounts and upon the terms and conditions in said policy stated, to which reference is hereby made. Denies each and every other allegation contained in Paragraph IV of said second cause of action.

V.

Admits that, as provided in said policy to which reference is hereby made, it had a fixed cash surrender value two years after the payment of the first annual premium. Admits that, as provided in said policy, the cash surrender value increased

thereafter with each annual premium paid. [42] Denies each and every other allegation contained in Paragraph V of said second cause of complaint.

VI.

Admits that the insured paid the annual premium on said policy of insurance up to and including the annual premium due and payable November 10, 1921, which, being payable in advance, would pay the premium accruing upon said insurance up to November 10, 1922. Denies each and every other allegation contained in Paragraph VI of said second cause of action.

VII.

Admits Paragraph VII of the second cause of action.

VIII.

Answering Paragraph VIII of the second cause of action, the defendant avers that it has not any knowledge or information sufficient to form a belief as to whether on November 10, 1922, the plaintiff was alive, and therefore denies the same. Defendant further avers that it has not any knowledge or information sufficient to form a belief as to whether the plaintiff is now alive, and therefore denies the same. Denies each and every other allegation contained in said Paragraph VIII of the second cause of action.

IX.

Denies each and every allegation contained in Paragraph IX of said second cause of action. In this connection defendant avers that on or about the date when said policy of insurance was issued, and

thereafter until the great depreciation in the mark currency of the German Empire, and its successor, the Republic of Germany, during and following the World War, 23.85 cents of the currency of the United States would usually purchase in the open market one mark of the German currency in which said [43] policy was payable, and one mark of such currency, during said times, would usually buy on the open market approximately 23.85 cents of the currency of the United States. That in August, 1924, a new currency was created and established by the Republic of Germany, the unit of which was and is the Reichsmark. That, subject to small market fluctuations, one Reichsmark usually can be purchased in the open market for about 23.85 cents of United States currency, and conversely 23.85 cents of the United States currency, subject to said fluctuations, will usually purchase one Reichsmark. That the mark currency in which the said policy of insurance was payable had greatly depreciated prior to August, 1924, and said currency was stabilized by the Republic of Germany in August, 1924, on the following basis: One million million marks of the old mark currency in which the policy was payable was made the equivalent in value of one Reichsmark of the new currency established in August, 1924.

X.

Denies each and every allegation contained in Paragraph X of the said second cause of action. In this connection defendant alleges that one Reichsmark of the currency provided for by the German Monetary Act of August 30, 1924, subject to minor

market fluctuations, was worth at the time this action was commenced, and now is worth on the open market approximately 23.85 cents in American currency.

XI.

Denies each and every allegation contained in Paragraph XI of said second cause of action. In this connection the defendant further alleges that on November 10, 1922, and at all times thereafter, the mark currency in which said policy of insurance was payable had depreciated to a point where it was practically valueless; that the amounts called for by said [44] policy of insurance, if the same had been in force on November 10, 1922, and thereafter, were payable lawfully by the payment of the number of marks therein specified in said depreciated currency. On August 30, 1924, the German Republic established a new currency, the unit of which was and is the Reichsmark. From and after August 30, 1924, the mark currency in which the said contract of insurance was written and was payable, if the same was in force and anything due thereunder, had an actual stabilized value of one million million of said old or depreciated marks to one Reichsmark, and from and after August 30, 1924, all contracts payable in the old or depreciated mark, including the said contract of insurance, were payable in Reichsmarks on the basis of one of the latter for one million million of the former.

XII.

Denies that the sum of $1,000.00, or any sum, is a reasonable sum to be allowed to the plaintiff herein

as attorneys' fees, and denies that the plaintiff is entitled to recover any sum whatsoever as attorneys' fees in this action. [45]

Now comes the defendant, and for its ANSWER TO THE THIRD CAUSE OF ACTION in plaintiff's complaint contained:

I.

Admits that at all times in said third cause of action and herein mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and for many years last past was and now is doing business in the State of Oregon as a foreign insurance company pursuant to the provisions of Chapter 203 of the 1917 General Laws of Oregon.

II.

Admits that during all the times in said third cause of action and herein mentioned the defendant was authorized to issue policies of life insurance in various forms, and that the business of the defendant, in part, was the issuance of life insurance policies. Admits that it was authorized to issue, and did issue, life insurance policies in the State of New York, within the United States. Denies that it was authorized to issue, or at any time issued, life insurance policies or other policies of insurance in any part of the United States other than in the State of New York. Admits that prior to August 1, 1914, it was authorized to issue, and did issue, life insurance policies in the Empire of Germany, under and in accordance with the laws thereof. De-

means that it issued any policies of life insurance, or other forms of insurance, in the Empire, or its successor, the Republic of Germany, subsequent to August 1, 1914.

III.

Admits and alleges that prior to November 10, 1911, one Henry Heine made written application to the defendant for [46] a life insurance policy. In this connection alleges that said application was made at the office of the defendant in Berlin, Germany, on or about the 10th day of October, 1911. Admits that on November 10, 1911, the defendant, at its office in Berlin, Germany, issued to one Henry Heine, then and at all times thereafter a resident and citizen of Germany and a resident of Berlin therein, a life insurance policy No. 4648273, in consideration of the payment by him to the defendant of the first annual premium of 7078 marks of the currency of the German Empire, and the terms and covenants in said policy of insurance to be kept and performed by the insured. Said policy was written and issued in the German language. That said policy is similar in terms with policy No. 4648275, copy of which is attached hereto as Exhibit 1, except as to the number thereof and the principal amount and the annual premium. Denies each and every other allegation contained in Paragraph III of said third cause of action.

IV.

Admits that defendant by said policy of insurance insured the life of Henry Heine, therein mentioned, in the sum of 200,000 marks, as in said

policy specified, and agreed to make payment in the amounts and upon the terms and conditions in said policy stated, to which reference is hereby made. Denies each and every other allegation contained in Paragraph IV of said third cause of action.

V.

Admits that, as provided in said policy to which reference is hereby made, it had a fixed cash surrender value two years after the payment of the first annual premium. Admits that, as provided in said policy, the cash surrender [47] value increased thereafter with each annual premium paid. Denies each and every other allegation contained in Paragraph V of said third cause of action.

VI.

Admits that the insured paid the annual premium on said policy of insurance up to and including the annual premium due and payable November 10, 1921, which, being payable in advance, would pay the premium accruing upon said insurance up to November 10, 1922. Denies each and every other allegation contained in Paragraph VI of said third cause of action.

VII.

Admits Paragraph VII of the third cause of action.

VIII.

Answering Paragraph VIII of the third cause of action, the defendant avers that it has not any knowledge or information sufficient to form a belief as to whether on November 10, 1922, the plaintiff was alive, and therefore denies the same. Defend-

ant further avers that it has not any knowledge or information sufficient to form a belief as to whether the plaintiff is now alive, and therefore denies the same. Denies each and every other allegation contained in said Paragraph VIII of the third cause of action.

IX.

Denies each and every allegation contained in Paragraph IX of said third cause of action. In this connection defendant avers that on or about the date when said policy of insurance was issued, and thereafter until the great depreciation in the mark currency of the German Empire, and its successor, the Republic of Germany, during and following the World War, 23.85 cents of the currency of the United States would usually purchase [48] in the open market one mark of the German currency in which said policy was payable, and one mark of such currency, during said times, would usually buy on the open market approximately 23.85 cents of the currency of the United States. That in August, 1924, a new currency was created and established by the Republic of Germany, the unit of which was and is the Reichsmark. That, subject to small market fluctuations, one Reichsmark usually can be purchased in the open market for about 23.85 cents of United States currency, and conversely 23.85 cents of the United States currency, subject to said fluctuations, will usually purchase one Reichsmark. That the mark currency in which the said policy of insurance was payable had greatly depreciated prior to August, 1924, and said currency was stabilized by the Republic of Germany in

August, 1924, on the following basis: One million million marks of the old mark currency in which the policy was payable was made the equivalent in value of one Reichsmark of the new currency established in August, 1924.

X.

Denies each and every allegation contained in Paragraph X of the said third cause of action. In this connection defendant alleges that one Reichsmark of the currency provided for by the German Monetary Act of August 30, 1924, subject to minor market fluctuations, was worth at the time this action was commenced, and now is worth on the open market approximately 23.85 cents in American currency.

XI.

Denies each and every allegation contained in Paragraph XI of said third cause of action. In this connection the defendant further alleges that on November 10, 1922, and at all times thereafter, the mark currency in which said policy of [49] insurance was payable had depreciated to a point where it was practically valueless; that the amounts called for by said policy of insurance, if the same had been in force on November 10, 1922, and thereafter, were payable lawfully by the payment of the number of marks therein specified in said depreciated currency. On August 30, 1924, the German Republic established a new currency, the unit of which was and is the Reichsmark. From and after August 30, 1924, the mark currency in which the said contract of insurance was written and was payable, if the same was in force and anything due

thereunder, had an actual stabilized value of one million million of said old or depreciated marks to one Reichsmark, and from and after August 30, 1924, all contracts payable in the old or depreciated mark, including the said contract of insurance, were payable in Reichsmarks on the basis of one of the latter for one million million of the former.

XII.

Denies that the sum of $2,000.00, or any sum, is a reasonable sum to be allowed to the plaintiff herein as attorneys' fees, and denies that the plaintiff is entitled to recover any sum whatsoever as attorneys' fees in this action. [50]

FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH OF THE ALLEGED CAUSES OF ACTION OF THE PLAINTIFF.

For a first further and separate answer and defense to each of the alleged causes of action of the plaintiff, the defendant alleges:

I.

That at all times herein mentioned the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and in 1911, and theretofore and thereafter, and until about the first day of August, 1914, defendant issued policies of life insurance in various forms within the jurisdiction and territorial limits of the Empire, afterwards Republic, of Germany.

II.

That on or about May 12, 1901, there was duly enacted by the legislative authority of the Empire of Germany certain laws pertaining to insurance companies doing business within said Empire, including and applicable to this defendant. Said laws have not been repealed and are a part of the laws of the Republic of Germany, which succeeded the Empire of Germany. Said laws were written and enacted in the German language, and a substantial translation of portions thereof, having application to this defendant, and to the issues involved in this cause, is hereto annexed, marked Exhibit 2, and hereby made a part of this first further and separate answer and defense. Defendant was authorized and admitted to transact a life insurance business in Germany, and at all times fully and duly complied with all of the provisions of said laws and with all laws, decrees and regulations issued pursuant to authority of the German government in relation to the defendant and its said business. [51]

III.

That prior to November 10, 1911, one Henry Heine made written application to this defendant for insurance, and pursuant to such application there was issued to him by the defendant its policy No. 4648275, a substantial English Translation of which is attached to this answer, marked Exhibit 1 and made a part hereof. At the same time and place the said Heine made written application to this defendant for life insurance, and based thereon the defendant issued to him its policy No. 4648274,

which is identical with said policy No. 2428275 except in number. At the same time and place the said Heine made written application to this defendant for life insurance, and based thereon the defendant issued to him its policy No. 4648273, which is identical with said policy first mentioned except as to the number thereof and except that it is for the principal sum of 200,000 marks.

At the time each of said applications was made and each of said policies was issued, and at all times thereafter, the said Heine was a citizen and subject of and resident in Germany. Each of said applications and each of said policies was written in Germany, in the German language, and each of said policies of insurance was by the defendant executed and delivered to the insured in Germany, under and pursuant to the laws of that country. Each of said policies was to be performed wholly in Germany and all payments thereunder to be made according to the terms thereof in marks at the office of the defendant in Berlin, Germany, and not otherwise. Each of said policies was and is a German contract, subject to and to be construed according to the laws of Germany.

Each of said policies contains certain provisions, a substantial English translation of which reads as follows: [52]

> "For all lawsuits the Company, as Defendant, submits at the option of the Plaintiff, either to the jurisdiction of the Courts to which its Chief Representative for Germany is subject, or the Courts to which the General Rep-

resentative for a given Federal State is subject, if such representative has been appointed pursuant to § 115 of the Law regarding Private Insurance Enterprises or to the jurisdiction of the Court to which the German Agency is subject, through which the insurance was issued. The Office of the General Representative for the German Reich in Berlin or the Office of the General Representative for a given German Federal State is to be considered the domicile of the Company within the country, provided the latter has been appointed pursuant to § 115 of the law regarding private insurance enterprises."

At all times since each of said policies was executed and issued by this defendant to the insured, the defendant has kept and maintained, and still keeps and maintains an office and chief representative for Germany at Berlin, where said policy was applied for and issued. The general representative was appointed pursuant to Section 115 of the law regarding private insurance companies. That said general representative at all times might be and now may be served with summonses or other judicial processes issued out of the courts of Germany. That during all of said time the defendant has kept and maintained, and still keeps and maintains, other agents and representatives in Germany upon whom might be and may be served summonses and other judicial processes issued out of said courts. During all of said times the defendant was, and now is, subject to be summoned into and within the jurisdiction of the Courts of Germany.

IV.

That at the time each of said policies of insurance was applied for an issued, and for many years thereafter, the mark currency referred to in each of said applications and in [53] each of said policies was the mark currency of the Empire of Germany, and afterwards its successor, the Republic of Germany.

From about December 4, 1873, until the outbreak of the World War in 1914, the currency of the German Empire was defined and established by Articles I, II and III of the German Laws of December 4, 1871, and Article XIV of the German Monetary Law of July, 1873, and the German Monetary Law of June 1, 1909.

On or about August 4, 1914, the legislative authority of the German Empire duly enacted a law amending the coinage and monetary laws of Germany then existing. Said latter law was published as the Law of August 4, 1914, in the Reichsgesetzblatt, page 326, and contained these provisions, among others:

"Paragraph 1:

Until further notice the provisions of section 9, paragraph 2, sentence 2 and 3 of the Coinage act of June 1, 1909 (Reichgesetzblatt, p. 507) are amended to the effect that federal treasury notes and notes of the Reichsbank can be issued instead of gold coin.

"Paragraph 2;

The Federal Council is authorized to determine the date on which the provisions referred

to in paragraph 1 of the present Act will again become effective.

"Paragraph 3:

This Act becomes effective on the date of the publication."

And on August 4, 1914, the legislative body of the German Empire enacted a law concerning Federal treasury notes, which was published on or about August 4, 1914, in the Reichsgesetzblatt 1914, at page 347, and contained the following provisions, among others:

"Paragraph 1:

Federal treasury notes are legal tender until further notice.

"Paragraph 2:

Until further notice the Reichshauptkasse (Note: the Central Imperial pay office) is not obligated [54] to redeem the federal treasury notes nor is the Reichsbank obligated to redeem its notes.

"Paragraph 3:

Until further notice the private note banks are authorized to utilize notes of the Reichsbank for the redemption of their notes.

"Paragraph 4:

The Federal Council is authorized to determine the date on which the provisions of paragraphs 1 and 3 of the present Act becomes obsolete.

"Paragraph 5:

This Act becomes effective with regard to paragraphs 2 and 3, beginning July 31, 1914, and in all other respects on the date of its publication."

That the mark currency provided for in the various German laws hereinbefore referred to, and which continued to be the currency of the German Empire, and its successor, the German Republic, until after the German Monetary Act of August 30, 1924, became effective, will be hereinafter referred to as the old mark. The currency provided for by the said Monetary Act of August 30, 1924, the unit of which was and is the Reichsmark, will be hereinafter referred to as the new mark.

V.

During the World War and subsequent thereto, and as a consequence thereof, and the resulting impairment of German credit and currency inflation, the said old mark greatly depreciated in value and purchasing power. This depreciation resulted in a corresponding decrease or depreciation in the value of all notes, bonds, mortgages and other securities and investments payable in marks, which included practically all of the assets of the defendant in Germany and there invested, as required by the German insurance authorities as a condition to its right to transact business in Germany, largely in German national, state and municipal bonds and other securities, all payable in the old mark. Said old mark continued [55] to be the German currency in which all mark contracts were payable

until after the enactment of the Monetary Act of August 30, 1924. Prior to the enactment of said law and its companion Bank Act hereinafter referred to, all obligations theretofore created and payable in marks, including any and all obligations of either party to this action under or based upon either of the said policies of insurance, were payable and lawfully payable, at the option of either party to either of said contracts of insurance, in the old mark in its depreciated value, that is, by paying the number of marks specified in the contract. And neither party to either of said contracts of insurance had any other right or claim by reason of the provisions of either of the contracts of insurance, or any other right or claim whatsoever against the other, save such as might be given as a matter of grace or public policy by the German courts pursuant to Section 242 of the German Civil Code which is hereinafter referred to.

VI.

By August, 1924, the old mark had depreciated to such an extent that it was practically valueless, and all securities, notes and obligations payable therein, including said policies of insurance, and including the assets of the defendant in Germany had suffered a like depreciation. On August 30, 1924, the Republic of Germany duly enacted a new monetary law which provided for and created an entirely new currency, called the Reichsmark, and made it legal tender currency of Germany. As hereinbefore stated, the said new currency is herein referred to as the new mark.

Article I of said Monetary Law of August 30,

1924, translated from the German language into the English language, [56] reads as follows:

> "The currency of the German Reich is a gold currency. Its unit of account is the Reichsmark, which is divided into one hundred Reichspfennig."

Article V of the said law, translated from the German language into the English language, reads in part as follows:

> "In so far as a debt is payable in marks of old currencies, the debtor is entitled to effect the payment in such manner that one million millions of marks is made equal to one Reichsmark."

Said law has not been repealed or modified.

On August 30, 1924, Germany further duly enacted a Bank Act, which was published in the Reichsgesetzblatt of 1924, Part II, pages 235 et seq., and Article 3 of said Bank Act, translated from the German language into the English language, reads substantially as follows:

> "The Reichsbank is bound to call up the total amount of its old notes in circulation and to exchange them for Reichsmarks. One million millions of marks of former issues shall be replaced by one Reichsmark. The redeemed notes shall be destroyed. Detailed regulations for the calling up of the old notes and for the delays to be fixed for their delivery and cancellation shall be determined by the Directorate of the Reichsbank."

That Article I of the First Decree for the Carrying in Effect of the Monetary Law (Erste Verordnung zu Durchfuhrung des Muntzbesetzes) of October 10, 1924 (published in the Reichsgesetzblatt of 1924, Part II, page 383), provides that one million millions of the old marks is made equal to one new mark, that is one Reichsmark.

VII.

The courts of Germany, in construing and determining the effect of said monetary and banking laws of August 30, 1914, and prior laws hereinbefore referred to, have determined and declared that contracts made in Germany and payable in Germany currency are subject to German law, and that any person seeking [57] to recover upon such contract, if the contract was entered into prior to August, 1924, and therefore payable in the old mark, can only recover an amount of the new mark created and issued under the monetary laws of August, 1924, on the basis of one new mark for each million million old marks called for in said contract, except a species of relief based on Section 242 of the German Civil Code. That attached hereto and marked Exhibit 3 are certain identifying data and material portions of some of the decisions of the courts of Germany which have so construed and declared the law.

VIII.

Section 242 of the German Civil Code, above mentioned, translated into English, substantially provides that:

"The debtor is obliged to perform in such a manner as faith and credit with regard to custom requires."

Under this statutory provision the German courts, not being restrained by constitutional limitations, or controlled by precedent, or restricted by rules or principles of law as are the American courts, adopted the practice, as a matter of alleged public policy, of taking into account, in an action upon any contract or obligation, after the old mark had greatly depreciated, the necessities of the one party to a contract and the capacity of the other to pay; the economic condition of Germany generally, and particularly of the parties to the litigation and their dependents; the public interest in the matter, the loss or gain of either party to the obligation, having regard to the consequences of the war, and many other factors which the German courts considered as having relation to the public policy of that country. And upon these considerations the said German courts would, and did, in [58] certain classes of cases, fix the amount which the debtor should pay and the creditor should receive, without any regard to the terms of the contractual obligation upon which the action was based. That said law and the said practice in the German courts were and are peculiar to its jurisprudence and the judicial system and authority of that country, and the considerations upon which the German courts act and the varying relief given are not within the competency of an American court to consider or give. That plaintiff at all times was, and now is,

a resident in and citizen and subject of Germany. That by reason of the aforesaid facts, if the plaintiff were otherwise entitled to recover anything, the amount of his recovery would and should be limited to the value of the number of old marks called for in the policies of insurance, upon the basis of one million million thereof for one new mark, the latter being worth in the open market approximately 23.85 cents in American currency, and such rights as he might have under the valorization laws of Germany, and decrees issued thereunder, copies of certain applicable portions thereof being attached hereto as Exhibits 4 and 5 and made a part hereof, of which the administrative body set up thereunder has exclusive jurisdiction, and possibly some further relief under the provisions of Section 242 of the German Civil Code aforesaid, which the German courts alone are competent to give. [59]

SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH OF THE ALLEGED CAUSES OF ACTION OF THE PLAINTIFF.

For a second further and separate answer and defense to each of the alleged causes of action of the plaintiff, the defendant:

I.

For the purpose of avoiding unnecessary repetition the defendant reaffirms and re-alleges all and singular the matters and things set forth in the foregoing further and separate answer and defense, and hereby adopts and incorporates the same into

this second further and separate answer and defense.

II.

Alleges that heretofore, and on or about the 10th day of November, 1911, upon written applications of one Henry Heine made in Germany, the defendant issued to him its policy of insurance No. 4648275, and English translation of which is attached hereto as Exhibit 1, and its policy No. 4648274, substantially similar to the policy first mentioned herein, and its policy No. 4648273 for the principal insured amount of 200,000 marks and otherwise substantially similar to the policy of insurance first herein mentioned. At the time each of said policies was applied for and issued, and at all times thereafter, the said insured was, and now is, a resident in and a citizen and subject of the Empire and/or its successor, the Republic of Germany, and each of said policies was issued in Germany, in the German language, to be performed in Germany, and each was and is a German contract subject to and to be construed according to the German laws.

Article IX of the German Insurance Laws of May 12, 1901, an English translation of which is attached hereto as Exhibit 2, provided and required, at the time said policies of insurance were issued, and at all times thereafter, that [60] certain general conditions should be contained in each of said policies of insurance, and, among others, that each thereof should contain provisions governing and controlling—

"The proceedings in cases of dispute arising from the insurance contract, the competent court," etc.

Pursuant to the requirements of such law the following provisions were inserted in and made a part of each of said policies of insurance, viz.:

"For all lawsuits the Company, as Defendant, submits at the option of the Plaintiff, either to the jurisdiction of the Courts to which its Chief Representative for Germany is subject, or the Courts to which the General Representative for a given Federal State is subject, if such representative has been appointed pursuant to § 115 of the Law regarding Private Insurance Enterprises or to the jurisdiction of the Court to which the German Agency is subject, through which the insurance was issued. The Office of the General Representative for the German Reich in Berlin or the Office of the General Representative for a given German Federal State is to be considered the domicile of the Company within the country, provided the latter has been appointed pursuant to § 115 of the law regarding private insurance enterprises."

III.

At the time each of said policies was issued the defendant had and maintained in Berlin an office and General Representative, which defendant has at all times since kept and maintained. That during all of said times the defendant had and maintained and still has and maintains at its office in Berlin,

a Chief or General Representative for the Reich (Germany), and agents and representatives at Karlsruhe and elsewhere in Germany, appointed pursuant to Section 115 of the said German insurance law, and said Chief Representative and the said other agents and representatives of the defendant were at all times, and now are, subject to the jurisdiction of the German courts and the service of summonses and other [61] lawful processors issued out of said German courts might lawfully be served upon them, binding upon and in behalf of the defendant. During all of said times the defendant might be, and may now be, summoned into any German court, or into or before any other German tribunal of competent jurisdiction, and particularly the courts of Berlin, in any suit or action upon said policies of insurance, or in any suit or action for the enforcement of any right or claim which the insured may have against the defendant. During all of said times the courts of Germany were, and now are, open and functioning, ready and competent to take and exercise jurisdiction with respect to any controversy, dispute or action on or arising out of either of the said policies of insurance, or any right or claim based thereon.

IV.

During all of the times herein mentioned, and now, and in respect of the performance of either of the said policies of insurance, or any dispute or disputed claim on either of said policies of insurance, or any controversy, action or suit based on or arising therefrom, the courts specified in said policies

had and have exclusive jurisdiction, and no other court has or would have any right, power or jurisdiction in respect to such matters, or to pronounce any judgment or decree or any adjudication whatever upon or regarding the rights or obligations of either party to either of said policies of insurance, or any party claiming any right thereunder, that would be recognized or have any force or validity in or given any effect in Germany. And neither the executive, administrative nor judicial authorities of Germany now or at any time lawfully could or would admit or recognize the right or jurisdiction of [62] any court other than the courts specified in respect of such matters. And the defendant further alleges that any judgment pronounced by the courts of Oregon, or pronounced by any court other than the German courts specified, would not and will not be recognized by, and would not and will not be given any force or effect whatever in Germany, either under the laws of Germany or the principles of international comity, and would not and will not in anywise impair or take away from the plaintiff the right to bring an action in the German courts specified against this defendant upon either of said contracts of insurance. That provisions in contracts of insurance similar to those set forth in Paragraph II of this further and separate answer and defense, with respect to the courts having jurisdiction of disputed claims on the policies of insurance, have been interpreted by sundry decisions, among others that of William Reinke against New York Life Insurance Company, decided by the Circuit Court of Appeals of Berlin, Germany, on or

about November 2, 1927. Said action was upon a policy of insurance issued by the said New York Life Insurance Company which contained a clause or condition similar to the provisions hereinbefore set forth, and contained in each of the policies upon which this action is based, and which vested exclusive jurisdiction on disputed claims arising on the policy of insurance there involved in a designated German court. Said Court of Appeals is a court of record with general appellate jurisdiction, and there is no higher court in Germany except the Supreme Court thereof, and the decisions of said Court of Appeals are of binding force and effect under the laws of Germany and throughout the whole of Germany unless and until overruled and set aside by the said Supreme Court. That said decision has [63] not been overruled or set aside by the Supreme Court. That by said decision it was held and adjudged that under the laws of Germany in force at the time the said policy of insurance was issued, and at all times thereafter, and now, no action upon a policy of insurance could be prosecuted or maintained in any court, foreign or domestic, except the court specified in the policy of insurance, and that no other court had any power or jurisdiction to entertain such suit or action or pronounce judgment thereon, and that no judgment pronounced by any other court had any force, validity or effect whatsoever.

V.

That by reason of the matters and things hereinbefore alleged the courts of Germany have exclusive jurisdiction over disputed claims on and actions

brought under or based upon either of said policies of insurance, and that this court has no jurisdiction of this action, and should not take or exercise jurisdiction herein, or pronounce, or undertake to pronounce, any judgment for or against either party to this action, and this action should be dismissed and abated. [64]

THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH OF THE ALLEGED CAUSES OF ACTION OF THE PLAINTIFF.

For a third further and separate answer and defense to each of the causes of action set forth in the complaint of plaintiff, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things set forth in the foregoing further and separate answers and defenses.

II.

Alleges that on or about the 10th day of November, 1911, upon the written application of one Henry Heine made in Germany, the defendant issued to him its policy of insurance No. 4648275, an English translation of which is attached hereto as Exhibit 1, and its policy No. 4648274, substantially similar to the policy first mentioned herein, and its policy No. 4648273 for the principal insured amount of 200,000 marks and otherwise substantially similar to the policy of insurance first mentioned herein. Each of said policies was executed by the defendant in Germany and delivered to the said insured

in Germany. That said insured, at the time each of said policies was issued, was, and thereafter continued to be, a resident in, citizen and subject of Germany. That each of said policies was payable in German currency at Berlin, Germany, and all of the terms and conditions thereof were to be performed in Germany in accordance with the German law. Each thereof was and is a German contract, to be construed according to German law. That plaintiff at all times was, and now is, a citizen and subject of and resident in Germany. That during all of the times herein mentioned the defendant was, and now is, domiciled in Germany, where it maintains its office and an agent at Berlin, Germany, upon whom service of process issued out of the courts of [65] Germany may be made, and during all of said times was, and now is, subject to the jurisdiction of the German courts.

III.

Prior to December 31, 1921, there was duly created and organized, under the laws of the Republic of Germany, a corporation authorized to carry on and conduct, among other things, a life insurance business, and known and organized under the name and style of "Kronos Deutsche Leben-Versicherungs Aktien-Gesellschaft." Thereafter, and on or about the 15th day of February, 1927, the corporate name was changed to "Mannheimer Lebensversicherungsbank A. G." The said corporation will be hereinafter referred to as "Kronos."

IV.

Article 14 of the German Insurance Law of 1901,

and contained in Exhibit 2 attached hereto, provides in substance that every agreement transferring the insurance business and contracts of one insurance company to another, either as a whole or of certain branches, with reserves and other assets, requires the approval and sanction of the German authorities having supervision of both parties to any such agreement. On or about the 31st day of December, 1921, the defendant, under the control, direction and with the approval of the German insurance authorities and of the German Government, duly assigned and transferred to the said Kronos all of its German business, insurance policies and contracts, excepting only a few policies of the following classes: (a) Policies payable by their terms in currencies other than German marks; and (b) Policies held by citizens and subjects of countries other than Germany; and (c) Policies held by German citizens and subjects, not residents of Germany, and who were paying premiums outside of [66] Germany in other than German marks. The said exceptions did not and do not include either of the policies involved in this action.

The said assignment and transfer was taken and received by said Kronos likewise under the control and direction of and with the approval of the said German insurance authorities.

Article 2 of the German Insurance Law of May 12, 1901, provides, in substance, that the supervision of a domestic insurance business, or company, is carried on by the government of any one of the German states in cases where the business is confined to the districts of that state, either by its by-

laws or other business conditions, otherwise, that is when the business is not so confined, the supervision is carried on by the Imperial Office of the German Empire appointed for that purpose.

Section 91 of said German Insurance laws provides, in substance, that the supervision of a foreign insurance business, or company, which had been admitted to do business in Germany, is carried out by the Office of Supervision for Private Insurance. Since the establishment of the Republic of Germany the Imperial Office for the Supervision of Private Insurance is denominated the Federal Superintendent's Office of Private Insurance.

At the time of such transfer all of the assets of the defendant hereinafter more particularly referred to and embraced within such transfer, were in the custody and under the control and subject to the direction and supervision of said German insurance authorities, for the benefit and protection of all citizens of and residents in Germany to whom the defendant had issued insurance contracts, and have so remained. [67]

At the time of the transfer to the said Kronos, pursuant to the control and direction and with the approval of the said German insurance authorities, and in consideration of the obligations hereinafter more particularly referred to, assumed by the said Kronos, the defendant transferred and turned over to the said Kronos its right, title and interests to all of the assets aforesaid. These included all of the reserves and assets of the defendant accruing from or growing out of all premiums paid upon contracts of insurance issued by the defendant in Ger-

many, amounting to approximately 115,000,000 marks, and as required by the said Kronos and the said German insurance authorities, the further sum of 2,000,000 marks denominated a "caution," and other property, and an additional sum required by the German insurance authorities, amounting to upwards of 37,000,000 marks.

V.

And in further consideration of the premises, with the approval and consent of the German government and the German insurance authorities, the said Kronos undertook and contracted to and did assume, all and singular, the obligations of the defendant under the policies of insurance upon which this action is based and all other policies of insurance included within the said transfer, and the performance thereof, and did undertake and contract that the said Kronos would be and was substituted for the defendant in all such obligations, and that the defendant would be wholly released from all further liability and obligation under the said contracts of insurance.

That said transfer, and particularly the payment and contribution by the defendant of the moneys and assets hereinbefore referred to in addition to the total premium reserves, [68] for the benefit of the said holders of insurance contracts, were greatly to the benefit and advantage of the plaintiff and all German citizens and residents holding insurance policies of the defendant. And in consideration of the premises the said Henry Heine assented to said transfer and substitution of the Kronos for the defendant, and agreed thereto, and agreed to and with

the defendant and the said Kronos, with the approval of the said German insurance authorities, that the defendant would be and was released from all obligations under either of the policies of insurance upon which this action is based, and that the said insured and the plaintiff herein would look solely to the said Kronos for the performance thereof under the supervision of the German insurance authorities and in accordance with the German law.

That by reason of the foregoing there has been a complete novation, the defendant has been released from any obligation to the plaintiff or anyone else upon either of the said policies of insurance, and the Kronos substituted in its place and stead, and therefore this action should be abated and dismissed. [69]

FOURTH FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH OF THE ALLEGED CAUSES OF ACTION OF THE PLAINTIFF.

For a fourth further and separate answer and defense to each of the alleged causes of action of the plaintiff, the defendant:

I.

For the purpose of avoiding unnecessary repetitions re-alleges and reaffirms all and singular the matters and things set forth in the foregoing further and separate answers and defenses to each of the causes of action of the plaintiff, and hereby adopts and incorporates the same into this fourth further and separate answer and defense.

II.

Alleges that on July 16, 1925, there was duly enacted by the Republic of Germany a law entitled "Gesetz uber die Aufwertung von Hypotheken und anderen Auspruchen," published in the issue of July 17, 1925, of the Reichsgesetzblatt, Teil I, Number 31 of 1925, a correct English translation of the title thereto being "Law as to the rating-up (valorization or revaluation) of mortgages and other claims," generally known and called the Valorization or Revaluation Law. A correct English translation of Sections 59, 60 (subsections 1 and 2), 61 and 62 of said law is attached hereto, marked Exhibit 4, and here referred to and made a part of this answer. On November 29, 1925, the Minister of Justice of the Republic of Germany, being duly authorized so to do, duly promulgated a decree for the carrying into effect of said Revalorization Law, entitled "Durchfuhrungs verordnung sum Aufwertungsgesetze," published in the issue of December 5, 1925, of the Reichsgesetzblatt, Teil I, Number 51 of 1925, a correct English translation of said title thereto being "Decree for the carrying into effect of the Revalorization Law." A correct English translation of [70] Sections 95, 96, 97 (subsections 1 and 3), 100, 101 (subsections 1 and 3), 102, 103, 104, 105, 111, 114 and 115 of said decree is hereto attached, marked Exhibit 5, and is here referred to and made a part of this answer. Said decree of November 29, 1925, has the force and effect of law within the German Republic. Said law of July 16, 1925, and said decree of No-

vember 29, 1925, are hereinafter sometimes referred to as said Revalorization laws.

III.

Defendant at all times was, and now is, a supervised company under the said insurance laws and the said valorization laws and the said decree of November 29, 1925, and was at all times, and now is, subject to the direction and control of the German office of Supervision for Private Insurance with respect to all funds collected from premiums on policies issued in Germany, the disposition of all such funds, the character of investments to be made thereof, and in all other respects. Prior to the commencement of this action, and in accordance with the provisions of Section 115 of the decree of November 29, 1925, aforesaid, the Federal Superintendent's Office of Private Insurance of the Republic of Germany held and decided that the defendant was a supervised insurance concern and should stand as such under the supervision of the Reich within the meaning of the said insurance and valorization laws and the said decree.

That in accordance with the said Insurance laws and the regulations and decrees issued thereunder, and in accordance with the control and direction of the German insurance authorities, the defendant was required to and did deposit with said insurance office, and subject to its control, all premium [71] reserves on all of the insurance policies issued in Germany, and in addition was required to and did deposit with said German authorities, from moneys derived from sources other than German policies

and German business, and as a condition to the transaction by the defendant of an insurance business in Germany, the sum of 2,000,000 marks at a time prior to the depreciation of the German currency; and all of said funds, in accordance with said control and direction and said insurance laws, were required to be and were invested in German securities payable in the old mark.

At the time of the outbreak of the World War the defendant had invested in Germany, subject to the control and direction of said insurance authorities, in bonds and other securities payable in old marks, all of the said premium reserves and additional funds, and amounting to approximately 86,000,000 marks. Thereafter, and due to the heavy losses growing out of war conditions and war mortalities in Germany, the defendant sent from other than German sources, to its German office, to meet demands arising out of said insurance business, and which were so used, upwards of 5,700,000 marks.

Subsequent thereto, and by direction of the German insurance authorities, the defendant and Kronos turned over for the payment and liquidation of all liabilities under insurance contracts issued to German citizens and subjects, including the policies of insurance upon which this action is based, the entire German premium reserve of the defendant, which included all reserves and assets of the defendant accruing from or growing out of premiums paid upon contracts of insurance issued by the defendant in Germany, and consisting of cash, German Federal, state and municipal bonds, other German secuities and loans [72] on policies, amount-

ing in all to approximately 115,000,000 marks, and the further sum of 2,000,000 marks, denominated a "caution" by the said German insurance authorities, and a further sum denominated as "an extra premium reserve" in the sum of approximately 37,000,000 marks, which constitute the valorization stock or fund hereinafter referred to.

IV.

That each of the policies of insurance hereinbefore referred to is included within the contracts and obligations covered by said valorization laws and said decree of November 29, 1925. That all of the funds and assets of the defendant aforesaid are now being administered by and under the direction of the said German insurance authorities in accordance with the said laws.

By the provisions of Section 62 of the said valorization laws there is reserved to claimants payable in old marks, who do not come under the provisions of said law, the remedy of recovery of the number of old marks specified in the contract or obligation, or the conversion value thereof in the new mark on the basis of one of the latter for one million million of the former, and such other and further relief as might be given under Section 242 of the German Civil Code to claimants entitled to the benefit of that Act, and no other rights of actions or remedies. For such claims, however, as do come within the said valorization law, including the claims upon which this action is based, the claimant's right of recovery is exclusively under the said law, the determination of which is exclusively with

the German insurance authorities, and is not such a right as is enforceable either in the courts of Germany or the courts of any other country. This has been the [73] construction and interpretation given to said laws and the decrees promulgated thereunder by the administrative and executive branches of the German government and by the German courts, and is the true interpretation of said laws. In this connection reference is made to excerpts from decisions of the German courts contained in Exhibit 3, attached hereto.

V.

That by reason of the matters and things herein alleged, this action should be dismissed and abated, and plaintiff remitted for the enforcement of his rights and remedies to the courts and other tribunals of Germany having jurisdiction in the premises. [74]

FIFTH FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH OF THE ALLEGED CAUSES OF ACTION OF THE PLAINTIFF.

For a fifth further and separate answer and defense to each of the alleged causes of action of the plaintiff, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things alleges in the preceding answers and the preceding separate answers and defenses herein, and adopts and incorporates the same into this fifth further and separate answer and defense.

II.

Defendant further alleges that each of the insurance policies on which this action is based was applied for and entered into in Germany; that all payments thereunder were, by the terms of said policies, required to be made in the mark currency of that country; that each of said policies is a German contract which must be construed in accordance with the laws of that country. That said Henry Heine at all times was a resident, citizen and subject of Germany. The defendant is engaged in the transaction of business in Germany, and was at all times mentioned in the pleadings in this case, and during all of said time was and now is subject to processes of and may be sued in the German courts.

The administrative machinery provided for and set up in connection with and for the administration of the valorization laws aforesaid is now at work and functioning. The Courts of Germany are open and functioning. The plaintiff can have a fair and impartial hearing of his alleged claims and rights upon the said policies of insurance, either in the German Courts or before said administrative body.

All the witnesses in this case to other than formal [75] evidence now reside in Germany. The transactions involved in this case occurred in Germany and were carried forward in the German language, in which language all documents, correspondence and the like connected with the transactions involved in this case, were written.

A consideration of this case upon the merits must necessarily put upon this Court the burden of familiarizing itself with the jurisprudence of Germany, which involves the examination into and study of many statutory provisions, including Section 242 of the Civil Code; several monetary and banking laws in force in Germany prior to the World War; legislation touching the same subject enacted by Germany during and after the war; the legislation resulting in the practical demonetization of the old mark and the creation of a new mark in 1924; the valorization acts of 1925 and the regulations and decrees passed and put into force under these several acts by executive and administrative officers of the German government; the extent of the power of the executive and administrative officers to issue such regulations and decrees; the legal effect thereof; also the existence and scope of the judgments of the courts of Germany; the actions, administrative policy and opinions of the unwritten law of Germany; the usages, customs and unwritten law of Germany; the writings of German jurists and other sources of information.

Because of these matters and other matters appearing upon the face of the pleadings, the character and extent of the right of action or claim which the plaintiff has, if any, must be determined solely by German law, and the relief to which plaintiff is entitled, if any, under German law is of such a nature that this Court is not competent to grant or pronounce [76] judgment thereon, and such relief is not in harmony with the practices of this

Court or the principles of jurisprudence of this state or nation. And this Court should not retain jurisdiction, but should abate and dismiss this action and remit the plaintiff to his remedies before the courts and other tribunals of Germany.

WHEREFORE, defendant prays that plaintiff take nothing by this action, and that defendant have and recover from plaintiff its costs and disbursements herein.

HUNTINGTON, WILSON & HUNTINGTON, and

CLARK & CLARK,

Attorneys for Defendant. [77]

EXHIBIT No. 1.

Translation of German Policy.

NEW YORK
LIFE
INSURANCE COMPANY.

THE NEW YORK LIFE INSURANCE COMPANY HEREBY OBLIGATES ITSELF to pay the amount of ONE HUNDRED THOUSAND Mark D. Rwg. after deduction of any indebtedness to the Company under this insurance-contract to the Wife of the insured

Mrs. Anna Heine, born Hirsch

in its Office in Berlin, after receipt of due proofs that the insured Mr. Henry Heine died while this policy was in effect.

This contract is made in consideration of the payment of the first premium of THREE THOUSAND FIVE HUNDRED THIRTY NINE Marks

00 Pfennig D. Rwg., receipt of which is hereby acknowledged, constituting the payment for the period ending the tenth of November, one thousand nine hundred twelve furthermore on condition that a like sum be paid on the last named date and subsequently on the tenth of November of each year, while the insured is living.

THIS INSURANCE PARTICIPATES IN THE PROFITS OF THE COMPANY.

The dividends are distributed annually, pursuant to the principles and methods published in the annual report of the Company, which have to be submitted to the proper authority of the German Reich for approval and which cannot be changed without the latter's consent. The policyholder has an absolute claim to the dividend declared on this insurance at the end of each calendar-year, if the premiums have been paid in full to the anniversary following this calendar-year. The dividends are payable every year on the anniversary of the insurance, however not earlier than March 31st. at the option of the insured,

either: (1) in cash,

or: (2) applied toward the payment of a premium or any of the premiums,

or: (3) applied toward participating addition to the insured amount,

or: (4) left with the Company at 3% compound interest per annum, and payable together with this compound interest when the insurance amount becomes due.—These credits how-

ever may be withdrawn on any anniversary-date of the insurance. [78]

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If the insured fails to make any other decision, within the three months following notification by the Company as to the optional modes of settlement, then the dividends shall be applied, pursuant to (3) toward increase of the insurance-amount. The Company is ready at any time to purchase the additions mentioned here for cash which shall never be less than the original cash-dividend.

The insurance conditions on the other side are a part of this contract.

This insurance-contract takes effect after this policy has been delivered to the insured.

The tenth of November one thousand nine hundred eleven shall be considered as the date of the beginning of the insurance.

IN WITNESS WHEREOF the "NEW YORK LIFE" INSURANCE COMPANY has caused the contract to be signed on the tenth of November of the year one thousand nine hundred eleven.

DARWIN P. KINGSLEY,
President.

WALKER BUCKNER,
Second Vice-President.

G. NIMPTCH.

GENERAL REPRESENTATIVE FOR THE GERMAN REICH.

For the General Representative for the German Reich.

GEORGE K. SCHLESIER.

Examined: (initials).

Age: 42.

Amount of insurance payable at death.

Annual Dividends.

Premiums payable for life.

Deutsches Reich. O. L. 911–225.

The insured may demand at any time copies of the declarations made by him in connection with this contract. [79]

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INSURANCE CONDITIONS.

1. THE CONTRACT.—This contract is free from all restrictions as to residence, travel and occupation. This policy contains all conditions having relation to the insurance-contract, and no employee, representative, agent or other intermediary is authorized, in the name of the Company, to make or change any insurance-contract or to keep the policy from lapsing, to extend the term for the payment of a premium, or to make any promises whatsoever, which are not provided for in this policy.

For the territory of the German Reich the Chief Representative for the German Reich has such authority, pursuant to § 86 of the Law relating to private insurance enterprises.

2. INCONTESTABILITY.—This insurance-contract after it has been in force one year, counting from the date of its issue, shall be incontestable, if the premiums have been paid regularly, unless the contract was obtained by fraud.

3. DEATH BY VIOLENCE.—If the insured should commit suicide, the Company declines payment of the insured amount and will, instead, refund the premiums paid only, without interest. The Company's obligation to pay however obtains if at the time of the death of the insured at least one year has elapsed from the date of the issue of the policy, or if absolute proof is furnished that the act was committed in a state of morbid mental derangement excluding free expression of one's will.

If the beneficiary designated in this policy has deliberately caused the death of the insured by an illegal act, the appointment of the beneficiary shall be considered as not having taken place. [80]

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4. PROOFS OF DEATH AND EVIDENCE OF AGE.—When claim for payment of the amount due at the time of death is made (hereinafter called insurance-capital) the Company must be furnished—as proof of death—with an official certificate of death, a detailed report from the physician concerning the cause of death to be given on a blank to be provided by the Company, and with evidence of his age. Should it be found that the age stated was not the true age of the insured,

the Company will pay a sum corresponding to the amount which the premiums paid would have purchased at the true age according to the premium-rates. Upon request the insurance-capital will be sent to the beneficiary, at his expense, upon receipt of the quittance. The Company shall decide as to the manner of remitting.

In case heirs or legal representatives have been appointed beneficiaries, the Company reserves the right to pay to the persons, proving their qualification as heirs by means of an inheritance-certificate or public testament, the proceeds against their joint quittance, irrespective of whether such persons have directly been appointed heirs, or have become heirs through elimination or refusal on the part of persons who had been appointed heirs before them. The Company reserves the right to pay to the heirs even in case such can prove to be heirs by a private testament only.

5. PAYMENT OF PREMIUMS.—The premiums are payable on the due date corresponding to the premium in question at the Chief Office of the Company in Berlin or at the German Office of the company situated nearest the residence of the insurant, if not otherwise agreed in writing; but always only against receipts of the Company bearing the signature of the Chief Representative for the German Reich. If any premium is not paid on or before the due date, interest at the rate of 5% per annum will be charged on the premium in arrear and for the time of the delay in the pay-

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ment. [81] Until the expiration of the term for payment stated in § 6 of this policy, the unpaid premium is considered an indebtedness to the Company, which will be deducted from the insurance-amount, if the insured should die prior to the expiration of such term.

All the premiums are to be considered payable annually in advance. If however permission is given to pay the annual premium in semi-or quarter-annual instalments, any unpaid part of the premium for the current year shall be considered an indebtedness to the Company under this policy, which will be taken into account if the contract should become a claim before it is repaid.

The payment of a premium shall not keep the insurance in force beyond the due date of the next premium, unless otherwise agreed on hereinafter.

6. NON-PAYMENT OF A PREMIUM.—GRACE PERIOD.—If the second or any subsequent premium is not paid on its due date, the Company sends immediately to the last known German address of the insurant, in a registered letter, a reminder, wherein a grace-period of twenty-eight days is specified, and calling attention to the consequences resulting from the non-payment of the premium. This grace-period begins from the receipt of the reminder, but is at least one month, calculated from the due date of the unpaid premium. If the insurant has failed to receive, or has received the reminder with some delay on

account of change of residence of which the Company has not been notified, the grace-period begins from the time at which the reminder would have reached the insurant in the regular way, if he had not changed his residence.

Should the insurant transfer his residence outside of Germany—the German Protectorates (Colonies) are considered as situated outside of Germany—the insurant, with the consent of the Company, may designate a foreign address for delivery, to which any declarations by the Company, meant for the insurant, may legally be sent. Instead of it the insurant may designate a person within Germany authorized to receive communica-

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tions. If no delivery [82] address has been agreed upon either in the first or in the second instance, the Company may address its declarations to the last known German address of the insurant. In such case the declaration becomes effective from the time at which it would have reached the insurant in the regular order of delivery.

If the insurant is in arrear with the payment at the expiration of the grace-period, the Company denounces the insurance contract by registered letter without further grace. The insurance then terminates in its previous form retaining the rights set forth in paragraph 14 of this policy. The same applies if the insured should die after expiration of the grace-period, and before the contract is denounced.

As long as the Company does not denounce the contract, it is obliged to accept the payments in arrear sent it direct, prepaid, thereby causing the removal of the consequences of the delay in the payment; on the other hand the Company is not entitled to demand further premiums.

7. CHANGE OF BENEFICIARY, PLEDGING AND TRANSFER.—The beneficiary designated in this policy may be changed. The Company must be notified of any change of beneficiary, of any pledging and of any transfer of this policy. The Company reserves the right to pay to the beneficiary last designated to it as such, as long as it has not been notified of any other change. The change of the beneficiary shall be entered by the Company on the fourth page of this policy in the table designated for such purpose.

8. PRIVILEGE TO CHANGE TO OTHER PLANS.—This insurance may, while it is in full force and as long as the insured is not yet 60 years of age, be changed at any time without a new medical examination into an insurance for the same amount to any plan with a higher premium issued by the Company at the time the original insurance took effect, with the exception of insurance for a fixed [83] term and pure endowment

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insurances. Such change takes effect upon the surrender of this policy and upon payment of an

amount equalling the difference between the premiums payable on the new plan and the premiums paid under the original insurance with five per cent compound interest per annum, from the due date of each premium to the day of the change. The beginning of the new insurance counts from the beginning of the present policy and the new premium is based on the same age at issue as the original insurance. The cash-value of any dividend credited to the policy may, the same as any excess of the cash-value of the dividends corresponding to the new plan, be applied toward the payment of the difference in the premium.

9. REINSTATEMENT.—The insurant has the right to have his policy reinstated within the two months following the due date of the unpaid premium, by payment of the premium in arrear with 5% interest per annum for the delay. The insurance as well as any loan-agreement made pursuant to the insurance conditions may, in accordance with the just mentioned conditions, be reinstated at any later time if proof is furnished, satisfactory to the Company, that the insurance risk and especially the condition of Insured's health has not deteriorated since the issuance of the policy. The evidence as to the condition of his health is to be furnished by means of a medical certificate, on blanks used by the Company when new insurance is issued.

10. JURISDICTION AND DOMICILE WITHIN THE COUNTRY.—For all law-suits the Company, as Defendant, submits at the option

of the Plaintiff, either to the jurisdiction of the Courts to which its Chief Representative for Germany is subject, or the Courts to which the General Representative for a given German Federal State is subject, if such representative has been [84]

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appointed pursuant to § 115 of the Law regarding Private Insurance Enterprises or to the jurisdiction of the Court to which the German Agency is subject, through which the insurance was issued. The Office of the General Representative for the German Reich in Berlin or the Office of the General Representative for a given German Federal State is to be considered the domicile of the Company within the country, provided the latter has been appointed pursuant to § 115 of the law regarding private insurance enterprises.

11. FEES.—The policy-fees are Mk.5.00 for each policy and must be paid by the insurant. Also all the stamp dues under this insurance must be repaid, in cash, to the Company by the insurant. Any other legal fees or taxes for the policy, premium-receipts, loan-agreements and other documents, all taxes and dues whether existing now or that may be imposed in future on insurance amounts or insurance premiums, as well as any expenses and stamp charges that may possibly accrue in connection with the contractual settlement must be borne by the insurant or by the beneficiary.

12. LOANS.—If the premiums on this insurance have been paid for two full years, the Company will grant, while this policy is in force, loans against the pledging of this policy as sole security, and upon the signing of the loan-agreement then in use by the Company. The maximum amount of the loan to be granted together with interest to the end of the current insurance-year and of any unpaid part of the premium for the current insurance-year must not exceed the cash-surrender-value at the end of the said insurance-year, including the cash-surrender-values of all dividend additions. Interest at the rate of 5% per annum is charged for the loans and is payable annually at the end of the year; if the interest is not paid when due, its amount will be added to the [85]

principal, and the interest charged shall be at the same rate. If the loan is not repaid, or an interest payment not made, the policy does not thereby lose its force. This may only happen when the total indebtedness under this policy to the Company equals the surrender-value (§ 14, Section 2). Then the Company sends, one month prior to such time, a reminder in the sense of § 6 of this policy. If the insurant is in arrear with the payment of the interest or repayment of the indebtedness at the expiration of the term of payment stated in the reminder, the Company denounces this contract, and the insurance ceases at the above mentioned time without any further compensation.

13. PAID UP INSURANCE AND PAYMENT BEFORE IT IS DUE.—If the dividends have been applied toward the increase of the insurance-amount and if at the end of any insurance year the premium-reserve on this policy, including the reserve on any insurance addition, derived from dividend credits, is not less than the single net premium, calculated at the 3% American Table of Mortality at the attained age of the insured, for the original insurance amount of this policy, then this policy, upon written request, may by means of a supplement to this policy be converted into a participating paid-up insurance, the amount of which bears the same proportion to the original insurance-amount as the premium reserve mentioned to the single net premium mentioned. If there is any indebtedness on the policy, such indebtedness remains on the said paid-up insurance, subject to the conditions mentioned under §12 of this policy. If, however, at the end of any insurance year the said premium-reserve is not less than the original insurance amount of this policy, the Company will immediately pay, upon request, on surrender of this policy, the amount originally insured under this policy, including the amount by [86] which the said premium-

reserve may exceed the original insurance-amount, however after deduction of any amount due under this insurance.

14. NON-FORFEITURE.—If at the expiration

of the grace-period indicated in §6 of this policy the insurant is in arrear with his premium payment, and at least two full year's premiums have been paid, the Company grants, in lieu of the denounced insurance, at the option of the insurant, within the three months following the due date of the unpaid premium, either

(a) The SURRENDER–VALUE of this insurance, or

(b) INSURANCE EXTENSION; to wit, insurance is granted for the full original insurance-amount, together with any dividend additions and less any indebtedness on this policy, however, without deduction of any unpaid part of the years' premium for the current insurance year, for a period calculated from the due date of the unpaid premium and for which the surrender-value is sufficient. The insurance extension is without further participation in profits and does not entitle to loans or surrender-values, or

(c) A NON–PARTICIPATING PAID–UP INSURANCE FOR A REDUCED AMOUNT, which is payable at the same time and under the same conditions as the original insurance-amount of this policy. The insurant may obtain at any time, pursuant to the provisions of Art. 12 "LOANS," a loan on this paid-up insurance; however, this loan must not exceed the then amount of the surrender-value of the paid-up insurance, or he may cancel the paid-up insurance against its surrender-value.

After payment of two or more years' premiums, the SURRENDER–VALUE of this insurance is the premium reserve of this insurance, including the premium-reserve for any existing dividend additions, less any indebtedness on this policy and any unpaid part of the years' premium for the current insurance-year, and less a "SURRENDER–DEDUCTION" which in no case may exceed one and one half per-cent of the insured amount, and which will not be imposed, after the premiums for ten or more full years have been paid. The premium-reserve of this insurance is calculated according to the [87] American Table of Mortal-

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ity and at an interest rate of three per cent per annum.

THE PERIOD OF THE INSURANCE EXTENSION and the reduced amount of the PAID–UP INSURANCE are obtained by applying the surrender-value as a single net premium for the purchase of the said form of insurance, and the age of the insured on the due date of the unpaid years' premium, the American Table of Mortality, and an interest-rate of three per cent per annum are taken as a basis. If within three months following the due date of the unpaid premium the insurant (a) fails to apply for the cash-surrender-value, and (b) fails to return the policy to the Office of the Company in Berlin, or (c) fails to apply for a paid-up insurance for a reduced amount, the original insurance will be converted into extended in-

surance (b). The same applies also prior to the expiration of the three months mentioned as long as the policy has not been surrendered, nor converted into a paid-up insurance for a reduced amount.

The insurant may at any time give notice of cancellation of the insurance relationship for the end of the current insurance-year, and if the insurance-relationship has existed at least two years, and the premium has been paid for such period, he may demand for the end of the current insurance year one of the above counter-values mentioned under (a), (b) and (c).

TABLE OF LOANS AND COUNTER–VALUES.

The values contained in the following table are those arrived at, according to the above rules, in taking into consideration the "SURRENDER–VALUE–REDUCTION," provided there is no indebtedness on the policy, and that no increase in the insurance-amount through dividends has taken place, and the years' premium for the corresponding insurance year has been paid in full. [88]

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The amounts of the values contained in columns 1–2 are for each Mk.1000.00 of the insurance amount. The insurance-amount of the present policy being Mk. 100,000, the amounts in columns 1–2 must be multiplied by 100, in order to obtain the amount of the loans, surrender-values, and the paid-up policy; the duration of the insurance extension

(column 3) must neither be multiplied nor increased.

	1	2	3	
After the insurance has been in force	Surrender-Values (Loans*)	Reduced paid-up insurance payable at death	Insurance-Extension for Mk. 100,000 for a duration of	
Years	M.	M.	Years	Months
2	19	40	1	10
3	43	85	4	0
4	59	115	5	3
5	80	153	6	9
6	100	187	7	11
7	122	224	9	1
8	144	260	10	0
9	167	296	10	10
10	190	331	11	6
11	211	360	11	11
12	233	389	12	3
13	254	417	12	5
14	275	444	12	7
15	297	470	12	8
16	319	495	12	9
17	341	520	12	9
18	363	544	12	8
18	363	544	12	8
19	384	567	12	7
20	406	589	12	6
21	428	610	12	5
22	449	631	12	3
23	471	651	12	1
24	492	670	11	10
25	512	688	11	8

The figures for subsequent years are calculated on the same basis and will be furnished upon request.

*) The loan-values given in the above table are the maximum amounts available at the end of a given insurance year. The loans may also be obtained during the insurance year, as indicated in Art. 12 "LOANS."

15. MODES OF SETTLEMENT AT THE DEATH OF THE INSURED.—If this policy has not been pledged or transferred, the insurant, or in case he has not made any provision, the beneficiary after the insured's death may, by written notice to the Company's General Office in Berlin, elect [89] that the net amount due at the death of the

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insured under his policy be paid, instead of in one single sum, in the following manner:

(1) The said net amount shall earn interest at three percent. The first interest payment shall be made one year after receipt and approval of proofs of death, the subsequent interest payments shall be made annually, as long as the beneficiary is living. Unless otherwise agreed upon in the above mentioned notice, the said net amount with accrued interest for the fractional part of the year elapsed shall be paid at the death of the beneficiary to the legal representatives of the beneficiary.

(2) The said net amount will be paid in accordance with the following ANNUITY-TABLE in equal annual instalments, for a definite number of years, agreed upon in advance, of which the first instalment is payable at once. The payments are made to the beneficiary or, if there is more than one beneficiary, to them jointly and to the surviving beneficiaries.

(3) The said net amount will be paid, pursuant to the following Annuity-Table in equal annual instalments for a fixed period of twenty years and thereafter for as many years more as the beneficiary, after the expiration of the twenty-year period, may live. The first instalment is payable immediately. If there is more than one beneficiary, the said net amount of this policy shall be considered as being divided into equal parts, if not otherwise provided for in the above mentioned notice. The annuity payable to each of the beneficiaries will be ascertained according to the following Annuity-Table, corresponding to the ages attained by the beneficiaries.

Any instalments that become due under (2) or (3) but are still unpaid at the death of the beneficiary, shall be paid to the legal representative of the beneficiary, if not otherwise agreed upon in the above mentioned notice.

ANNUITY-TABLES. — The instalment payments under any option may be made annually, semi-annually, quarterly or monthly, provided however that the capital is sufficient to form annuities amounting to at least M.200.00 for annual payment, M.100.00 for semi-annual payments, M.60.00 for quarter-annual payment and M40.00 for monthly payment. The aggregate of the instalment payments for each year must, in such event, be equal to the annual instalment indicated in the following table. The annual instalments correspond to an in-

surance of M.1000.00 net payable at the death of the insured. The figures in the table are applied *pro rata* to the insurance.

Option (2) Option (3)

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Number of Annuity Instalments	Amount of each Annuity Instalment	Age of the beneficiary at the death of the Insured	Amount of each Annuity Instalment	Age of the beneficiary at the death of the Insured	Amount of each Annuity Instalment	Age of the beneficiary at the death of the Insured	Amount of each Annuity Instalment
2	M507.39	0	M 42.48	25	M43.16	50	M 56.60
3	343.23	1	40.17	26	43.49	51	57.29
4	261.19	2	39.38	27	43.84	52	57.98
5	211.99	3	39.06	28	44.20	53	58.66
6	179.22	4	38.93	29	44.58	54	59.32
7	155.83	5	38.91	30	44.98	55	59.96
8	138.30	6	38.96	31	45.39	56	60.58
9	124.69	7	39.05	32	45.82	57	61.16
10	113.81	8	39.19	33	46.27	58	61.72
11	104.92	9	39.35	34	46.73	59	62.33
12	97.53	10	39.52	35	47.22	60	62.71
13	91.29	11	39.70	36	47.73	61	63.15
14	85.94	12	39.88	37	48.25	62	63.54
15	81.32	13	40.08	38	48.79	63	63.89
16	77.29	14	40.28	39	49.36	64	64.20
17	73.74	15	40.49	40	49.94	65	64.45
18	70.59	16	40.71	41	50.54	66	64.67
19	67.78	17	40.94	42	51.17	67	64.85
20	65.25	18	41.18	43	51.80	68	64.98
21	62.98	19	41.42	44	52.45	69	65.09
22	60.91	20	41.68	45	53.12	70	65.16
23	59.04	21	41.95	46	53.80	71	65.21
24	57.32	22	42.24	47	54.49	72	65.23
25	55.75	23	42.53	48	55.19	73	65.25
		24	42.84	49	55.89	and over	

If the insurant or the beneficiary, when selecting the option, have made no other disposition, the beneficiary may at any time return to the company the contract guaranteeing the annuity-payments in exchange for the dicounted value of the payments still to be made, calculated on the same basis as option (2) in the above table. However, under option (3) such surrender is admissible only after the death of the beneficiary, and then only if such death occurs within the above mentioned twenty years.

The above options of settlement are based on the assumption that an interest rate of three per cent has been earned. If, however, the Company should declare in any year a higher rate of interest than three per cent for the corresponding year on the [91] funds deposited with it for the said options

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of settlement, the amounts payable under options (1) and (2) will thereby be increased, also the amounts payable under option (3) during the fixed period of twenty years.

The above modes of settlement are not admissible, if the beneficiary is a firm or a corporation, or if the net amount due under this policy is less than Mk. 4000.00. [92]

EXHIBIT No. 2.

LAW REGARDING PRIVATE INSURANCE COMPANIES.

Dated May 12, 1901.

1. PRELIMINARY REGULATIONS.

Article 1.

Private enterprises for the purpose of carrying on insurance business are subject to supervision according to this law, excepting the regulations given in Articles 116, 117 and 122.

Article 2.

The supervision of the assurance business is carried out by the government of the country, in cases where the business is confined to the districts of one country of the Empire, by its By Laws or other business conditions, otherwise by the Imperial Office appointed for that purpose.

II. ADMISSION TO DO BUSINESS.

Article 4.

Assurance businesses must have the permission of the superintending office for carrying on business.

When applying for concession the business plan must be handed in, from which the purpose and the internal arrangements of the business must be discernible, also the district of the intended business and especially those resources from which are to be obtained the continuous ability of meeting the future liabilities of the business.

As parts of the business plan there is to be handed in:

1—the Company's contract or the By Laws in as far as the business is based upon the same.

2—the general assurance conditions and the technical business basis so far as they are requisite according to the manner of the intended insurances.

Article 5.

The concession is granted independent from the proof of a need and, unless the sphere of action of the business is confined according to the business plan to a certain period or a small district, without a limit of duration, and for the whole of the Empire respectively.

Article 7.

Concession to carry on business may only be refused if

1—the business plan is contrary to the legal requirements

2—if according to the business plan the interests of the assured are not sufficiently secured or the continuous fulfillment of the liabilities resulting from the assurances is not sufficiently demonstrated.

3—if there are facts justifying the assumption that a business will not be conducted according to the law or good morals. [93]

The concession can be made dependent upon a suitable security, the purpose of which and the condition of its repayment must be fixed.

Article 8.

The business contract of a stock company must

show the several branches of insurance over which the business extends, also the principles for the investment of the capital if the assurance business is to be carried on directly or also indirectly (through reassurance).

With business regulated by By Laws the data specified under 1 of Art. 8 are to be contained in the By Laws.

Article 9.

In general insurance conditions those conditions are to be contained which deal with:

1. The events at the occurrence of which the assurer is bound to an obligation, and cases in which for certain reasons this obligation is to be excluded or suspended (on account of wrong statements in the application, on account of alterations during the duration of the contract, etc.).

2. The manner, the extent and maturity of the obligation on the part of the assurer.

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6. The proceedings in cases of dispute arising from the assurance contract, the competent court and the appointment of a court of arbitration.

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Article 11.

The business plan of a life insurance business has to fully show its tariffs as well as the principles of calculating the premiums and premium reserves, especially stating the rate of interest and the loading of the net premium. It must also be

stated if and to what extent, in calculating the premium reserve, a method is to be applied according to which at first not the whole premium reserve is put back, in which case however 12½ per mille of the assured amount must not be exceeded. The tables of probability, especially as to mortality, and the risk of disability, and sickness forming the basis of the calculations, must be added.

* * * * * * * * * * *

Article 14.

Every agreement transferring the insurance in force of one Company to another, either entirely or certain branches, with the respective reserves and premium transfers, requires the sanction of the respective authorities of supervision of the business concerned. The sanction may only be refused for reasons as per Article 7. [94]

IV. MANAGEMENT OF INSURANCE BUSINESSES.

Article 55.

The books of an assurance business must be closed annually, from the books a Balance and an Annual Report describing the affairs and development of the business during the last business year has to be drawn up and handed to the Authority of Supervision.

Detailed requirements as to the time as well as the kind and style of the Balance Sheet and the annual report can be issued by the Authority of Supervision, so far as in this law or other Imperial

Laws of the Federal Council, regulations have not already been issued regarding the keeping of books and rendering of accounts of assurance businesses.

* * * * * * * * * * *

Article 56.

The premium reserve for life assurances on the insurance contracts in force is to be calculated and entered on the books at the close of every business year, separate for the several kinds of assurance, calculated on the basis of principles as per Art. 11.

* * * * * * * * * * *

Article 57.

The directors of the business have to see that the amounts, corresponding to the calculations as per Art. 56, are without delay transferred to the premium reserve fund and duly invested. This transfer may only then be omitted when special security from the premium receipts must be made abroad in favor of certain assurance contracts.

The premium reserve funds (monies, stock, documents, etc.) must be held separately from all other funds and to be kept at the seat of the enterprise in a manner of which the Authority of Supervision has been advised, the Authority of Supervision can also give permission for the keeping of the same in some other place within the German Empire.

* * * * * * * * * * *

Article 58.

For re-assurances the re-assured institution has to calculate and itself keep and administer the

premium reserve also for the re-assured amounts according to the regulation of Art. 56, 57.

Article 59.

The amounts (57) forming the reserve fund can be invested as follows:

1. In the manner described in Art. 1807, Section 1, Nos. 1 to 4 of the Civil Code, as to the investment of the monies of minors. Besides that the amounts may be invested up to the tenth part of the premium reserve fund in stock which, according [95] to the prescriptions of the respective State *in* admissible for the investment of the monies of minors, as well as in those mortgage certificates of German Mortgage Banks issued on owner, upon which the Imperial Bank grants loans in Class 1.

2. Against the pledging of such mortgages or securities, in which an investment according to No. 1 is permitted, up to 75% of their face value, but if the market value is less than the face value, up to 75% of their market value;

3. In the way that advance payments or loans be granted on the insurance policies of the organization itself (policy loans) in conformity with the general insurance conditions (Sec. 9, #8);

4. With the approval of the supervising authority, in obligations of district corporations of the country, of school communities and church communities, insofar as these obligations may be recalled by the creditor or are subject to a regular cancellation.

If the investment cannot, under the circumstances, take place according to any of the ways indicated under Div. 1, a transient investment in the Imperial Bank, in a State Bank, or in any other home bank or any public savings bank, declared suitable by the supervising authority, is permitted.

Article 60.

When investing the assets of the premium reserve fund, according to the provision of Sec. 59, div. 1, #1, the security of a mortgage, of a ground debt or of a rent debt may be accepted, if the loan does not surpass the first three-fifths of the value of the real estate. If the central authority of a federal state, in conformity with sec. 11, div. 2, of the Mortgage Bank law, has permitted the granting of loans upon landed property up to two-thirds of the value, the security may be accepted even with such a loan.

The loans must, as a rule, only be granted against first liens.

The loans on building lots and such new constructions as are not yet finished and productive of income, as well as on real estate not yielding a lasting profit, particularly on mines and quarries, are excluded.

The accepted value of the real-estate at the time of the granting of the loan must not surpass the selling value established after careful consideration. When establishing this value the lasting qualities of the real estate and the income which the said real estate would lastingly afford any owner as a

result of reasonable management, are alone to be considered.

At the request of the supervising authority the enterprises must issue a statement in regard to the appraisements, requiring the approval of the supervising authority.

Article 61.

Only such amounts may be taken out of the premium reserve fund besides the monies necessary for the investment or alterations in investments, which become freed by the occurrence of the assurance becoming due, surrender or other cases of ending the assurance contract.

V. SUPERVISION OF THE INSURANCE BUSINESSES.

Article 64.

It is the duty of the Authority of Supervision to control the [96] whole business management of the assurance businesses, especially the compliance with the legal requirements and the observation of the business plan. It is authorized to give such instructions which are suited to keep the administration of the business in a line with the legal requirements and the business plan, or to amend such defects which endanger the interests of the assured or bring the business management into variance with good morals. The Authority of Supervision can keep the owner or business manager of the business to the compliance with its regulations issued as per Section 1, by fines up to the

amount of M. 1000. Such fines are collected in the same manner as local taxes.

Article 65.

The Authority of Supervision is entitled to examine at any time the business management and financial position of a business, also whether the published annual accounts and reports agree with the facts and contents of the books and if the legal reserves exist and have been invested and are managed according to legal requirements.

The owners, managers, representatives, and agents of a business must on demand show to the Authority of Supervision in their business localities all books, vouchers and such documents which are of importance in forming an opinion of the management of the business and its financial condition, and give every required information as to the course of business and financial position.

Article 66.

The supervision extends also to the liquidation of a business, and the settlement of the assurances in force in case of a prohibition or voluntary discontinuation of the business, or in case of the recall of the Concession of a business. [97]

VI. FOREIGN INSURANCE COMPANIES.

Article 85.

Foreign insurance business, intending to carry on an assurance business in the country through representatives, attorneys, agents or other intermediaries need a permission for that purpose.

* * * * * * * * * * *

Article 86.

The decision of the Application for Concession is exclusively reserved to the Imperial Chancellor.

The Concession may only be given if:

1—the Imperial Office of Supervision of private assurance gives its expert opinion, after consultation with the advisory Board, to the effect that none of the reasons exist for refusal of the Concession as given in Art. 7.

2—the assurance business proves that at the head office of the business it can acquire rights in its own name, contract liabilities, appear in court as plaintiff and defendant.

3—the business binds itself to keep a branch within the Empire and to appoint for the country (home district) a head attorney who resides within the Empire. The head attorney is considered empowered to represent the business especially to close assurances with assurants in the home district and to close assurances of estates in the country with binding effect, also to receive all summonses and instructions for the business.

* * * * * * * * * * *

Article 87.

Foreign insurance companies, admitted to do business in the country, may close assurance contracts with assurants, residing ordinarily in the country, or assurance contracts of real estate in the country only through representatives residing in the country (Inland).

Article 89.

For actions against the company, arising out of

its inland (German) insurance business, the court of that place is competent where the branch establishment has its residence. This competence may not be excluded by agreement.

Article 91.

The supervision of the foreign assurance businesses which have been admitted, is carried out by the office of supervision for private assurance according to this law. By request of the Imperial Chancellor the Federal Council can also on its own free decision, determine upon the cancellation of the concession of admitted foreign offices. The execution of such a resolution lies with the Imperial Office for Supervision of private assurance. [98]

VII. REGULATIONS FOR THE INTERMEDIATE PERIOD.

Article 100.

If the Authority of Supervision does not consider the premium reserve sufficient for securing a continuous compliance of the liabilities arising from the assurance contract, it can grant a suitable period for the alteration of the mathematical principles or adoption of other amendments of the defects, reserving its right of interference as per Art. 67 to 69.

IX. FINAL REGULATIONS.

Article 115.

The Board of Directors of an insurance business, whose business extends beyond the limit of one

State, has to advise the central authorities of those States, in whose district it intends to do business, of the commencement of such transactions. Every assurance business must appoint a head representative in those States where it does business, unless its seat is in this State, if required by the central authorities of the State, provided the business in the State is of such importance, that the appointment of a head representative is justified. If the business denies the existence of such suppositions then the decision remains with the Federal Council on the basis of the proofs put before the same. A demand can be made by the Central Authorities of several States for the appointment of one common head representative. The head representative must have his residence in the respective State or the combined States respectively. He is considered empowered to represent the business, especially to close assurance contracts with assurants in the State, or in the combined States respectively, and to make binding contracts about real estate located there, also to receive all summonses and instructions for the business. In order to close life assurance contracts, however, the previous sanction of the head office of the business is requisite, which must be expressed in the contract.

Summonses which are issued against the business arising from assurance operations in the district of the State, or the combined States respectively, belong before the Court of that place where the head representative resides. This court must not be excluded by contract (agreement). [99]

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, A. E. Clark, being first duly sworn, depose and say that I am one of the attorneys for New York Life Insurance Company, defendant in the above-entitled cause; that this action is founded on a written instrument, described in the answer, that affiant is familiar with all the matters in dispute between the parties. That this verification is made by affiant for the foregoing reasons and the further reason that none of the officers of defendant reside in Multnomah County, Oregon, and all are absent therefrom.

A. E. CLARK.

Subscribed and sworn to before me this 17th day of April, 1929.

[Seal] VIVIAN PLEXNER,
Notary Public for Oregon.

My commission expires Dec. 14, 1931.

State of Oregon,
County of ————,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 18th day of April, 1929, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendant.

C. T. HASS,
By I. B. T.,
Attorney for Plaintiff.

Filed April 18, 1929. [100]

AND AFTERWARDS, to wit, on the 18th day of December, 1929, there was duly filed in said court an amended complaint, in words and figures as follows, to wit: [101]

[Title of Court and Cause.]

AMENDED COMPLAINT.

Comes now plaintiff and files this his amended complaint, and, for cause of action against defendant, alleges the following facts:

I.

During all the times herein mentioned defendant was, ever since has been, and now is a corporation organized and existing under the laws of the State of New York as a Mutual Life Insurance Company and engaged in the business of Mutual Life Insurance and the issuance of life insurance policies and contracts on the mutual insurance plan in the States of New York and Oregon and in the Empire of Germany, now the Republic of Germany.

II.

On November 11, 1911, defendant, upon the application of the plaintiff made, issued and delivered to him its policy of life insurance No. 4648275, written in the German language, a true and correct copy and translation of which into the English language is attached hereto and marked Exhibit "A," to which reference is hereby made

for all of the terms, conditions and provisions of said policy.

III.

The said plaintiff performed each and all of the conditions and covenants of said policy on his part to be done and performed up to November 10, 1922, and on that day he tendered to defendant the annual premium then coming due on said policy according to its terms, but defendant refused to accept said premium and then notified plaintiff that defendant denied all liability under and pursuant to said policy. [102]

IV.

On December 1, 1922, plaintiff was and still is alive and on that day plaintiff demanded of defendant payment of the surrender value of said policy as provided for in said policy and offered to surrender to defendant the said policy, but defendant failed and refused, and continues to fail and refuse, to pay any part thereof.

V.

The exchange value of one German mark, the medium of payment specified in said policy, on January 9th, 1914, was not less than twenty-three and eighty-five hundredths cents ($.2385), and at the time of the filing of the complaint herein the said exchange value was not less than said sum.

VI.

By reason of the facts aforesaid plaintiff has been damaged in the full sum of Five Thousand Thirty-two dollars ($5,032.00) and interest thereon at the

rate of 6% per annum from November 10, 1922, no part of which has been paid.

VII.

By reason of the facts aforesaid, plaintiff has been damaged specially in the further sum of $1,000.00, which sum plaintiff alleges is a reasonable sum to be allowed as attorney's fees in this action and for the payment of which to his attorneys appearing in this action plaintiff has necessarily and because of defendant's said wrongful acts incurred a liability.

And for a further and separate and second cause of action against defendant, plaintiff alleges:

I.

During all the times herein mentioned defendant was, ever since has been, and now is a corporation organized and existing under the laws of the State of New York as a Mutual Life Insurance Company and engaged in the business of Mutual life insurance and the issuance of life insurance policies and contracts on the mutual [103] insurance plan in the States of New York and Oregon and in the Empire of Germany, now the Republic of Germany.

II.

On November 11, 1911, defendant, upon the application of the plaintiff made, issued and delivered to him its policy of life insurance No. 4,648,274, written in the German language, a true and correct copy and translation of which into the English language is attached hereto and marked Ex-

hibit "A," to which reference is hereby made for all of the terms, conditions and provisions of said policy.

The only difference between the policy of which said Exhibit "A" is a copy and translation and the policy herein referred to is the number of the policy.

III.

The said plaintiff performed each and all of the conditions and covenants of said policy on his part to be done and performed up to November 10, 1922, and on that day he tendered to defendant the annual premium then coming due on said policy according to its terms, but defendant refused to accept said premium and then notified plaintiff that the defendant denied all liability under and pursuant to said policy.

IV.

On December 1, 1922, plaintiff was and still is alive and on that day plaintiff demanded of defendant payment of the surrender value of said policy as provided for in said policy and offered to surrender to defendant the said policy, but defendant failed and refused, and continues to fail and refuse, to pay any part thereof.

V.

The exchange value of one German Mark, the medium of payment specified in said policy, on January 9th, 1914, was not less than twenty-three and eighty-five hundredths cents ($.2385) and at the time of the filing of the Complaint herein the said

exchange [104] value was not less than said sum.

VI.

By reason of the facts aforesaid plaintiff has been damaged in the full sum of Five Thousand Thirty-two Dollars ($5,032.00) and interest thereon at the rate of 6% per annum from November 10, 1922, no part of which has been paid.

VII.

By reason of the facts aforesaid, plaintiff has been damaged specially in the further sum of $1,000.00, which sum plaintiff alleges is a reasonable sum to be allowed as attorney's fees in this action and for the payment of which to his attorneys appearing in this action plaintiff has necessarily and because of defendant's said wrongful acts incurred a liability.

And for a further and separate and third cause of action against defendant, plaintiff alleges:

I.

During all the times herein mentioned defendant was, ever since has been, and now is a corporation organized and existing under the laws of the State of New York as a Mutual Life Insurance Company and engaged in the business of Mutual Life Insurance and the issuance of life insurance policies and contracts on the mutual insurance plan in the States of New York and Oregon and in the Empire of Germany, now the Republic of Germany.

II.

On November 11, 1911, defendant, upon the ap-

plication of the plaintiff made, issued and delivered to him its policy of life insurance No. 4648273, written in the German language, a true and correct copy and translation of which into the English language, is attached hereto and marked Exhibit "A," to which reference is hereby made for all of the terms, conditions and provisions of said policy. [105]

And in the table of cash surrender values in said Exhibit "A," it being for 100,000 marks, the figure 100,000 therein is in the policy herein referred to 200,000, and the figure 100 therein is in the policy herein referred to 200.

III.

The said plaintiff performed each and all of the conditions and covenants of said policy on his part to be done and performed up to November 10, 1922, and on that day he tendered to defendant the annual premium then coming due on said policy according to its terms, but defendant refused to accept said premium and then notified plaintiff that defendant denied all liability under and pursuant to said policy.

IV.

On December 1, 1922, plaintiff was and still is alive and on that day plaintiff demanded of defendant payment of the surrender value of said policy as provided for in said policy and offered to surrender to defendant the said policy, but defendant failed and refused, and continues to fail and refuse, to pay any part thereof.

V.

The exchange value of one German mark, the medium of payment specified in said policy, on January 9th, 1914, was not less than twenty-three and eighty-five hundredths cents ($.2385) and at the time of the filing of the complaint herein the said exchange value was not less than said sum.

VI.

By reason of the facts aforesaid plaintiff has been damaged in the full sum of ten thousand and sixty-four dollars ($10,064.00) and interest thereon at the rate of 6% per annum from November 10, 1922, no part of which has been paid.

VII.

By reason of the facts aforesaid plaintiff has [106] been damaged specially in the further sum of $2,000.00, which sum plaintiff alleges is a reasonable sum to be allowed as attorney's fees in this action and for the payment of which to his attorneys appearing in this action plaintiff has necessarily and because of defendant's said wrongful acts incurred a liability.

WHEREFORE plaintiff prays for a judgment against defendant for the sum of $5,032.00, together with interest thereon at the rate of 6% per annum from November 10, 1922, and for the further sum of $1,000.00, and for the further sum of $5,032.00, together with interest thereon at the rate of 6% per annum from November 10, 1922, and for the further sum of $1,000.00, and for the further sum of $10,064.00, together with interest thereon at

the rate of 6% per annum since November 10, 1922, and the further sum of $2,000.00 and costs and disbursements of this action.

C. T. HAAS,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, C. T. Haas, being first duly sworn, depose and say that I am the attorney for the plaintiff in the above-named action and that the foregoing amended complaint is true as I verily believe. I make this verification by reason of the fact that the plaintiff is not a resident of Multnomah county, or of the State of Oregon, and that the within action is based upon documents in my possession.

C. T. HAAS.

Subscribed and sworn to before me this 18th day of Dec., 1929.

[Seal] IDA BELLE TREMAYNE,
Notary Public for Oregon.

My commission expires 7–10–32.

State of Oregon,
County of Multnomah,—ss.

Due service of the within amended complaint is hereby accepted in Multnomah County, Oregon, this —— day of December, 1929, by receiving a copy thereof, duly certified to as such by C. T. Haas, of attorneys for plaintiff.

A. E. CLARK,
Attorneys for Defendant.

Filed December 18, 1929. [107]

EXHIBIT "A."

Tax Stamp for
50 Marks fixed
and cancelled.

NEW YORK LIFE INSURANCE COMPANY.

The New York Life Insurance Company hereby obligates itself to pay at its office in Berlin the sum of 100,000 Marks German Legal Tender, subject to deduction of any sums due the company on this insurance contract to the wife of the insured, Mrs. Annie Heine, nee Hirsh, upon receipt of proper proof that the insured Mr. Henry Heine has died during the existence of this contract.

This contract is concluded upon basis of the payment of the first premium in the sum of Three Thousand Five Hundred and Thirty-Nine Marks 00 Pfennigs, German Legal Tender, receipt of which is hereby acknowledged, which is for the time period expiring on November 10th, 1912, with the further advance understanding that a payment in the same amount will be made on the date last indicated and furthermore on the 10th of November of each year thereafter as long as the insured lives.

This insurance participates in the profits of the company.

The dividends are distributed annually according to the basis as set forth in the annual reports of the company which are submitted to the German government authorities and approved by them and which cannot be altered without its approval. The

insured has an unconditional claim for the dividends declared on this insurance at the end of each calendar year if the premiums have been fully paid to the date following this calendar year. These dividends shall in each year on the anniversary of this insurance, however, not sooner than March 31st, according to the election of the insured, either

(1) be paid in cash,

or (2) applied to the payment of any premium or premiums

or (3) used in increasing the insurance capital sum participating in the profits [13]

or (4) invested with the company at 3% per annum to be paid together with this interest at the time the capital insurance sum becomes due. This credit may, however, be cashed in on any anniversary day of the insurance.

If the insured does not within three months after the company has sent him notice of his right to elect, arrive at another decision, then the dividends shall be applied according to No. 3 to increase the insurance capital sum. The company is at all times to repurchase the above mentioned increase of the capital stock sum for its cash value, which shall never be less than the original cash dividend.

The hereinafter following insurance conditions are a part of this contract. This insurance contract goes into effect after this policy has been delivered to the insured. The 10th of November of the year One Thousand Nine Hundred and Eleven is regarded as the commencement of the insurance.

IN WITNESS WHEREOF the New York Life Insurance Company has signed this contract on November 10th of the year One Thousand Nine Hundred and Eleven.

(Signed) DARWIN P. KINGSLEY,
President.

(Signed) WALKER BUCKNER,
Second Vice-president.

(Signed) G. HIMPTSCH,
Chief Attorney-in-fact for Germany.

Examined: (Illegible Initial)
For the Chief Attorney-in-fact for Germany.

Yearly Dividend.

Age: 48 years.

(Signed) GEO. K. CHLESIER.

Insurance sum payable upon death.
Premiums payable during life.
Germany, O. L. 911–225.

The insured may at any time demand copies of the statements which he made in connection with this contract. [14]

INSURANCE CONDITIONS.

1. THE CONTRACT.—This contract is free of all limitations as to place of residence, travel, or occupation. The policy contains all conditions affecting the insurance contract and no official representative, attorney in fact, agent, or other intermediary is empowered in the name of the company to conclude the insurance contracts or to alter or to preserve the same from lapsing, to postpone the due date of premium payments or to make any promises which are not provided for in the policy.

For the territory of Germany this power, according to paragraph 86 of the law for private insurance enterprises is in the Chief Attorney-in-fact for Germany.

2. INCONTESTABILITY.—This insurance contract is incontestable after one year computed from the date of the execution of the contrace if the premiums have been regularly paid, provided, of course, that it has not been voided by malicious deception.

3. VIOLENT DEATH.—The company declines payment of the insurance sum and in place thereof pays only the premiums paid in without interest if the insured commits suicide. The liability of the company, however, remains if one year since the execution of the policy has passed at the time of death, or if conclusive evidence is submitted, if the act was done under circumstances *show* an alien disruption of the mind destroying the will-power.

If the beneficiary indicated in this policy has by conduct contrary to law contributed to the death of the insured such designation as beneficiary is regarded as not having been made.

4. PROOFS OF DEATH AND PROOF OF AGE.—In making demands for payment of the amount owing at the time of death (hereinafter referred to as the capital insurance sum) there must be submitted to the company [15] as death case documents an official death certificate, a report of the doctor as to the cause of death on a form furnished by the company, and a certificate of age. If the age indicated is not the actual age of the insured then the company pays a sum which cor-

responds to the actual age of the insured in relation to the premiums paid as per schedule. Upon application, the capital sum of insurance will be remitted to the person entitled thereto at his costs upon previous sending in of his receipts. The manner of remittance is prescribed by the company.

In the event that heirs or successors in interest are indicated as beneficiaries, the company reserves the right to pay to those persons indicated as heirs in a certificate of heirship of a public testament against their joint receipt, without regard as to whether such persons are unconditionally entitled as heirs or have become heirs through lapse or assignment of persons who might have been heirs prior thereto. The company reserves the right to pay to heirs even if these have only a private testament.

5. PAYMENT OF PREMIUMS.—The premiums are payable on the due date of the respective premiums in the main office of the company at Berlin or in such German office of the company as is nearest to the residence of the insured, unless otherwise agreed to in writing; but always only against receipt of the company which bears the signature Chief Attorney-in-fact for Germany. If premium payments are not made on the date as by contract agreed upon, interest at the rate of 5% for the delinquent premiums for the period of delay shall be charged. Until the expiration of the period of grace as set forth in Paragraph 6 of the policy, the delinquent premiums shall be regarded as a debt owing to the company which shall be deducted from the capital insurance sum if the insured dies before the expiration of this grace period.

All premiums are to be regarded as payable yearly in advance. [16] If, however, payment of the annual premium is permitted in semi- or quarter-annual installments, then the unpaid portion of the current annual premium shall be regarded as a debt due the company arising out of the policy which will be taken into account if, prior to this payment a demand is made on this contract.

The payment of a premium shall not operate to keep the insurance in force after the due date of the following premium insofar as nothing to the contrary is provided hereinafter.

6. NON-PAYMENT OF A PREMIUM. PERIOD OF GRACE.—The second or a following premium not being made, at its due date, then the company will immediately send an admonition to the last German address of the insured given to it, in a registered letter in which, with reference to the consequences of non-payment of premium, a period of grace of 28 days shall be designated. This period of grace begins with the receipt of the admonition, but does not comprise less than one month computed from the due date of the unpaid premium. If the insured as a result of a change of residence, not communicated to the company, does not receive this admonition or receive this belatedly, then the period of grace begins with the time when the insured would have received the admonition as if there had been no change of residence and when in the regular course of forwarding, the insured would have received it.

Should the insured transfer his residence outside of Germany—the German Protectorates (Colonies)

are considered as situated outside of Germany—then the insured with consent of the company may give a foreign forwarding address to which the communications of the company which are intended for the insured may be lawfully addressed. In lieu thereof, the insured may also designate an attorney in fact within Germany. If no forwarding address either in the first or the second manner is agreed upon then the company may direct its communications to the last German address given to it by the insured. Such [17] communications then become valid at the point of time at which such communications in regular course of forwarding would have reached the insured.

If the insured after the lapsing of the period of grace is still delinquent in the payment then the company cancels the insurance relationship by a registered letter without provision for a time period of grace for translation, the insurance then ceases in its then existing status, with regard for the rights provided in Paragraph 14 of this policy. The same applies if the insured in case of delinquency dies after termination of the period of grace before the translation is completed.

So long as the company does not cancel the contract the company remains obligated to accept the delinquent amount due it which are remitted post paid with the effect that the results of delinquency are avoided; however, the company is not entitled to demand further premiums.

7. CHANGE IN BENEFICIARY HYPOTHECATION AND TRANSFER.—The beneficiary indicated in this policy may be changed. The com-

pany must be informed of any change of beneficiary, every hypothecation and every transfer of this policy. The company reserves the right to pay the beneficiary last indicated to it so far as it has not been given knowledge of any other change. The change in beneficiary shall be entered by the company on the schedule therefor intended on the fourth page of this policy.

8. PRIVILEGE FOR CONVERSION TO OTHER PLANS.—This insurance may as long as it is in full force and as long as the insured is not yet sixty years of age, at any time without a new medical examination, be changed into insurance for the same amount according to any plan with higher premiums which the company writes at the time the original insurance goes into effect, excepting therefrom insurance for a [18] definite term or insurance of survivorship. Such change goes into effect upon the surrender of this policy and against payment of an amount which is equal to the excess of the premium payable under the new plan over the premiums paid on the original insurance, together with 5% interest per year, computed from the due date of each premium to the date of change. The beginning of the new insurance is valid from the beginning of the insurance in the present policy and the new premium is based upon the same age as the original insurance. The cash value of any dividends credit to this policy may be credited to the payment of the difference in premiums in the same manner as the possible higher amount of the cash value of the dividends which correspond to the new plan.

9. REINSTATEMENT.—The insured is entitled to reinstate the validity of this insurance within two months after the due date of the unpaid premium if he pays the delinquent premium together with 5% interest per year. The insurance as well as any possible loan contract which may have been made under the insurance conditions will at any later time again be put into effect according to the above condition if it is adequately proven to the company that the risk of insurance and especially the health of the insured has not depreciated since the issuance of the policy. The evidence as to health is to be made by a doctor's certificate for which a form such as that used in taking new insurance is to be used.

10. JURISDICTION OF COURT AND DOMICILE OF THE COMPANY IN THIS COUNTRY.—In case of suit at law the company as defendant submits itself to the jurisdiction of the court, according to the election of the plaintiff, of its chief attorney in fact for the German nation, that is, its chief attorney in fact for the German Federation who would come into question under Paragraph 115 of the law for private insurance enterprizes, or the court within whose jurisdiction the [19] German agency through whom this insurance was arranged may be located. As domicile of the company in this country is regarded the office of the chief attorney in fact for the German nation in Berlin or its chief attorney in fact for any German state of the federation, as far as he as such comes within purview of Paragraph 115 of the law about private insurance enterprises.

11. FEES.—The policy fees amount to 5 marks for each policy and must be paid by the insured. In the same way, all stamp tax costs which may become due by this insurance must be reimbursed to the company in cash by the insured. Possible other lawful fees or excises for the policy premium receipts, evidence of death and other documents, all now existing or in the future to be prescribed lawful fees for excises against the capital insurance or the insurance premiums as well as all costs and stamp tax fees arising out of the adjustment of payment under the contract must be paid by the insured or the beneficiary.

12. LOANS.—When two full annual premiums have been paid on this policy the company, during the valid existence of this policy, grants loans against pledging of this policy as sole security and against signature of an evidence of debt as then customarily in use by the company. The highest amount available for loans with interest to the close of the insurance year and including a possibly unpaid portion of the premium for the current insurance year may not exceed the repurchase value at the end of such current insurance year including the repurchase value of all increases through dividends. The interest on loans is 5% per year and is payable annually at the end of each year; if the interest is not so paid when due, the amount thereof is added to the capital sum and is likewise to bear interest at the same rate. If the loan is not repaid or an interest payment made the policy does not by virtue thereof become invalid. This can only occur at a time when the total amount of the debt to the

company [20] against the policy becomes equal to the repurchase value (Paragraph 14, Sub-Par. 2). In that event the company, one month before this time period, sends an admonition in connection with which the conditions of Paragraph 6 of this policy apply. If the insured at the termination of the period of grace as set forth in the admonition still delinquent in the payment of the interest or the repayment of the debt, then the company expects cancellation according to Paragraph 6 of this policy, and the insurance lapses at the above indicated time without any further consideration.

13. RIGHT TO PREMIUM-FREE, INSURANCE AND PRIOR PAYMENTS.—If the dividends have been applied to increase of the capital insurance sum and if, at the end of any insurance year, the premium reserve of this insurance, including the reserve for possible increase through dividend credit, is not less one net premium computed on the basis of the American Mortality Tables at 3% at the age arrived at by the insured for the original capital insurance sum of this policy, then this insurance upon written application may by amendments to this policy be converted into a dividend-participating, premium-free insurance the capital insurance sum of which shall have the same relationship to the original capital insurance sum as the said premium reserve has to the one net premium. If there should be a debt against the policy then this debt remains against the said premium-free insurance under the conditions as set forth in Paragraph 12 of this policy. If, however, at the end of the insurance year, the above-mentioned premium reserve is not less than the original insurance

sum of this policy then the company will on application and against surrender of this policy immediately pay out the original insurance sum of this policy together with any amount which said premium reserve may be in excess of the original insurance sum, however, subject to deduction of any debt which may be due against the insurance. [21]

14. NON-LAPSABILITY.—If, after the termination of the period of grace as provided in Paragraph 6 of this policy, the insured is in arrears in his premium payments and he has paid at least two full annual premiums, the company allows in place of the cancelled insurance according to the election of the insured within three months after the due date of the unpaid premium allows either

(Cash)

(a) The repurchase value of this insurance, or

(b) Insurance Extension; that is, the insurance in its full original amount together with the increase thereof through dividends, and deducting any debts against the policy, however, without any deduction of unpaid portions of the annual premiums of the current year, will be extended for such a period, computed from the due date of the unpaid premium as the repurchase value allows. The insurance extension is without further participation in profits and does not afford the right to loan or repurchase value, or

(c) A non-profit participating premium-free insurance in a reduced amount, which is payable at the same time and under the same conditions as the original insurance sums of the policy. The insured may at any time

under the conditions of Article 12 "Loans" receive a loan on this premium-free insurance; such loans may, however, not exceed the amount which is the repurchase value of the premium-free insurance; or he may dissolve the premium-free insurance against its repurchase value.

(Cash)

THE REPURCHASE VALUE of this insurance upon payment of two or more annual premiums is the premium reserve of this insurance including the premium reserve for any existing increase through dividends, [22] less any debts existing against this policy and unpaid portions of the annual premium for the current year and an "Repurchase Deduction" which in no case shall amount to more than one and one-half per cent of the insurance sum and which does not apply if the premiums have been paid for ten or more full years. The said premium reserve of this insurance will be computed according to the American Mortality Tables and at an interest rate of 3% per year.

THE PERIOD OF INSURANCE EXTENSION and the reduced amount of PREMIUM-FREE INSURANCE are arrived at in that one

(Cash)

applies the repurchase value of one net premium to obtain the insurance demand in question is used as a basis the age of the insured on the due date of the last unpaid annual premium, the American Mortality Tables and an interest rate of 3% per annum. If the insured within three months after the due date of the unpaid premium upon sending in the

policy to the office of the company in Berlin, does not call in the repurchase value of the insurance in cash according to (a) or according to (c) does not apply for premium-free insurance in a reduced amount, then the original insurance is converted into the original insurance extended according to (b). The same also applies prior to expiration of the said three months, as long as the policy is neither repurchased nor it has been converted to reduced premium-free insurance.

The Insured may at any time cancel the insurance relationship at the close of the current insurance year and if the insurance relationship has existed for at least two years and the premium has been paid for this period of time, can demand at the close of the current insurance year one of the *the* (corresponding)
counter-values indicated under (a), (b) and (c).
(Corresponding)

TABLE OF LOANS AND COUNTER-VALUES.

The values indicated in the following table are those which in view of the "Repurchase Deduction" according to the above regulations [23] are arrived at provided that no debts exist against the policy and no increase of the capital insurance sum through dividends has taken place and that the annual premium for the respective insurance year has been fully paid.

The amount of the Values as indicated in column 1–2 applies for each 1,000 Marks insurance sum. As the insurance sum of this policy is 100,000 Marks, therefore the amounts contained in column 1–2 are to be computed 100 times to arrive at the

amount of the loans, the repurchase value, or the premium-free insurance policy; the duration of the insurance extension (Col. 3) may not be multiplied or increased.

After the insurance has been in effect	1. (Cash) Repurchase value (Loans*)	2. Reduced premium-free insurance for death cases	3. Insurance extension for 100,000 Marks for a period of	
Year.	M.	M.	Years	Months
2	19	40	1	10
3	43	85	4	0
4	59	115	5	3
5	80	153	6	9
6	100	187	7	11
7	122	224	9	1
8	144	260	10	0
9	167	296	10	10
10	190	331	11	6
11	211	360	11	11
12	223	389	12	3
13	254	417	12	5
14	275	444	12	7
15	297	470	12	8
16	319	495	12	9
17	341	520	12	9
18	363	544	12	8
19	384	567	12	7
20	406	589	12	6
21	428	610	12	5
22	449	631	12	3
23	471	651	12	1
24	492	670	11	10
25	512	688	11	8

The payment of values for further years are computed on the same basis and will be supplied on request.

*) The loan values indicated in the above table are the maximum amounts which are available at the end of any given insurance year. The loans may also be taken in the course of an insurance year as indicated in Article 12 "Loans." [24]

15. METHODS OF ADJUSTMENT UPON DEATH OF THE INSURED.—If the policy has not been hypothecated or otherwise transferred then the insured or as far as he has not disposed of the same, the beneficiary after the death of the insured, may by written declaration to the main office of the company at Berlin designate that the net amount due upon this policy by reason of the death of the insured, the following methods of payment instead of a single adjustment:

(1) The said net amount will bear interest at 3%. The first interest payment takes place one year from the receipt and finding of sufficiency of the proof of death, the following interest payments will be made each year so long as the beneficiary lives. If there is indicated in the above declaration nothing to the contrary, then at the death of the beneficiary the said net amount together with interest corresponding to the fractional year which has passed will be paid to the legal successor of the beneficiary.

(2) The above net amount will be paid according to the installment table indicated below in equal annual installments of which the first will be immediately payable, for a number of years agreed upon in advance. The payments are made to the beneficiary or if there is more than one beneficiary, then to these jointly and to their survivors.

(3) The said net amount will be paid according to the installment table set forth below in equal annual installments for a set period of 20 years and thereafter for so many more years as the beneficiary lives after the expiration of the 20-year pe-

riod. The first rate is payable immediately. If there is more than one beneficiary then the said net amount of the policy is regarded as divided into equal parts, provided there is nothing designated to the contrary in the above-mentioned declaration. The installments due each beneficiary are paid according to the installment table according to the ages arrived at by each beneficiary. Any installments which according to (2) or (3) have become due but have not been paid at the death of the beneficiary will be paid to the successor in law of the beneficiary so far as nothing [25] to the contrary is indicated in the above declaration.

ANNUITY (INSTALLMENT) TABLE.—The installment payments may under each choice be made annually, semi-annually, quarterly or monthly, provided, however, that the capital sum is sufficient to form an annuity which will amount to at least 200 marks in annual payments, 100 marks in semi-annual payments, 60 marks in quarter-annual payments, and 40 marks in monthly payments. The sum of the partial payments must for each year correspond to the yearly rate as indicated in the following table. The annual installments correspond to an insurance by which 1,000 marks net becomes payable upon the death of the insured. The figures in the table are to be applied *pro rata* to this insurance.

CHOICE OF PAYMENT (2)		CHOICE OF PAYMENT (3)					
Number of annual installments	Amount of each annuity	Age of the beneficiary at death of insured	Amount of the annuity	Age of the beneficiary at death of insured	Amount of each annuity	Age of the beneficiary at death of insured	Amount of each annuity
2	M507.39	0	M 42.48	25	M43.16	50	M 56.60
3	343.23	1	40.17	26	43.49	51	57.29
4	261.19	2	39.38	27	43.84	52	57.98
5	211.99	3	39.06	28	44.20	53	58.66
6	179.22	4	38.93	29	44.58	54	59.32
7	155.83	5	38.91	30	44.98	55	59.96
8	138.30	6	38.96	31	45.39	56	60.58
9	124.69	7	39.05	32	45.82	57	61.16
10	113.81	8	39.19	33	46.27	58	61.72
11	104.92	9	39.35	34	46.73	59	62.23
12	97.53	10	39.52	35	47.22	60	62.71
13	91.29	11	39.70	36	47.73	61	63.15
14	85.94	12	39.88	37	48.25	62	63.54
15	81.32	13	40.08	38	48.79	63	63.89
16	77.29	14	40.28	39	49.36	64	64.20
17	73.74	15	40.49	40	49.94	65	64.45
18	70.59	16	40.71	41	50.54	66	64.67
19	67.78	17	40.94	42	51.17	67	64.85
20	65.25	18	41.18	43	51.80	68	64.98
21	62.98	19	41.42	44	52.45	69	65.09
22	60.91	20	41.68	45	53.12	70	65.16
23	59.04	21	41.95	46	53.80	71	65.21
24	57.32	22	42.24	47	54.49	72	65.23
25	55.75	23	42.53	48	55.19	73	65.25
		24	42.84	49	55.89	and over	

As long as the insured or the beneficiary has not made any other disposition at the time of determining his choice, the beneficiary may at any time return to the company the contract which guarantees the annuity payment against the discounted value of the payments to be made in the future, computed upon the same basis upon which rests the choice (2) in the above table. However, as to choice (3)

such repurchase is [26] only permissible after the death of the beneficiary and then only if said death occurs within the above mentioned 20 years.

The above methods of adjustment are based on the presu*mt*ion that an interest yield of 3% will be obtained. If, however, the company in any year declares a higher rate of interest than 3% for the respective year on the funds set aside for the indicated methods of adjustment, then the amount due under choice (1) and (2) are increased as are the amounts payable under choice (3) during the set period of 20 years.

The above methods of adjustment are not permissible if the beneficiary is a firm or corporation or if the net amount due on this policy is less than 4,000 marks.

CHANGE OF BENEFICIARY.

Date of entry.	BENEFICIARY	Signed in the Name of the Chief Attorney-in-fact by

CHANGE IN THE MANNER OF PAYMENT OF THE SUMS DUE OUT OF THIS POLICY.

Note:—Changes in the method of payment or revocation of such changes must be applied for in

writing and are valid only when entered in this table by the company.

Date of Entry.	METHOD OF PAYMENT.	Signed in the Name of Chief Attorney-in-fact by—

[27]

NEW YORK LIFE
INSURANCE COMPANY.

* * * * * * * * * *

Insurance upon the Life of Mr.

HENRY-HEINE

* * * * * * * * * *

Policy No. 4,648,274.—

Sum of 100,000 Marks, German Legal Tender.
Annual Premium—3,539 Marks,
German Legal Tender.

NEW YORK
LIFE INSURANCE COMPANY
Main Office of the Company
346 & 348 Broadway, New York.

General Management for Germany
Berlin W.—Wilhelmstrasse 80a

11225

(Translation of Sticker to Policy)

COMMUNICATION AS TO DIVIDENDS.

The insurance laws of the State of New York provide that the surplus due on all policies issued

from January 1, 1907, on shall be computed and distributed annually. To avoid misunderstanding, we wish to call attention to the fact that during the first insurance year a surplus is not likely to arise. Therefore, the first dividend payment probably will not follow until the end of the second insurance year, therefore, not before the due date of the third annual premium.

"NEW YORK"
Life Insurance Company.

Germany.

[Endorsed]: Filed Oct. 23, 1928. [28]

AND AFTERWARDS, to wit, on the 18th day of December, 1929, there was duly filed in said court a stipulation relative to exhibit attached to complaint, in words and figures as follows, to wit: [108]

[Title of Court and Cause—No. L.–10,465.]

STIPULATION RELATIVE TO EXHIBIT ATTACHED TO COMPLAINT.

It is hereby stipulated by and between respective counsel herein that the translation of the insurance policy herein, attached to the original complaint, may be considered as attached to the amended complaint filed herein.

C. T. HAAS,
Attorney for Plaintiff.
A. E. CLARK,
Attorneys for Defendant.

Filed December 18, 1929. [109]

AND AFTERWARDS, to wit, on the 4th day of February, 1930, there was duly filed in said court a stipulation that answer to complaint shall stand as answer to amended complaint, in words and figures as follows, to wit: [110]

[Title of Court and Cause—No. L.–10,465.]

STIPULATION THAT ANSWER TO COMPLAINT SHALL STAND AS ANSWER TO AMENDED COMPLAINT.

It is stipulated by and between the parties to this action as follows:

I.

That the several answers and further and separate answers and defenses contained in the answer to the original complaint herein shall stand as the answers and further and separate answers and defenses to each of the causes of action set forth in the amended complaint, unless and until the defendant shall amend its said answer or file new answers and separate answers and defenses to the amended complaint.

II.

It appears that the arrangement of matter in the first, second and third causes of action in the amended complaint varies somewhat from the arrangement in the first, second and third causes of action in the original complaint, and therefore, without intending in anywise to limit the general provisions of the preceding paragraph, but for con-

venience and as a matter of identification, it is agreed: [111]

1. With reference to the first cause of action set forth in the amended complaint it is stipulated:

(a) That Paragraphs I and II of the answer to the first cause of action in the original complaint apply particularly to Paragraph I of the amended complaint; and

(b) That Paragraph III of said answer applies particularly to Paragraph II of the amended complaint; and

(c) That Paragraphs IV, V, VI and VIII of said answer apply particularly to Paragraphs III and IV of the amended complaint; and

(d) That Paragraphs IX, X and XI of said answer apply particularly to Paragraphs V, VI and VII of the amended complaint; and

(e) That Paragraph VI of said answer shall be disregarded; and

(f) That every allegation in said first cause of action not admitted by said answer and this stipulation is deemed denied.

2. With reference to the second cause of action set forth in the amended complaint, it is stipulated:

(a) That Paragraphs I and II of the second cause of action in the original complaint apply particularly to Paragraph I of the amended complaint; and

(b) That Paragraph III of said answer applies particularly to Paragraph II of the amended complaint; and

(c) That Paragraphs IV, V, VI and VIII of

said answer apply particularly to Paragraphs III and IV of the amended complaint; and

(d) That Paragraphs IX, X, XI and XII of said answer apply particularly to Paragraphs V, VI and VII of the amended [112] complaint; and

(e) That Paragraph VII of said answer shall be disregarded; and

(f) That every allegation in said second cause of action not admitted by said answer and this stipulation is deemed denied.

3. As to the third cause of action set forth in the amended complaint, it is stipulated:

(a) That Paragraphs I and II of the answer to the third cause of action in the original complaint apply particularly to Paragraph I of the amended complaint; and

(b) That Paragraph III of the answer applies particularly to Paragraph II of the amended complaint; and

(c) That Paragraphs IV, V, VI and VIII of the answer apply particularly to Paragraphs III and IV of the amended complaint; and

(d) That Paragraphs IX, X, XI and XII of the answer apply particularly to Paragraphs V, VI and VII of the amended complaint; and

(e) That Paragraph VII of the answer shall be disregarded; and

(f) That every allegation in said third cause of action not admitted by said answer and this stipulation is deemed denied.

III.

Nothing herein shall limit the right of defendant to file an amended answer and separate answers and defenses to the amended complaint.

Dated this 30 day of January, 1930.

C. T. HAAS,
Attorney for Plaintiff.
A. E. CLARK and
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Defendant.

Filed February 4, 1930. [113]

AND AFTERWARDS, to wit, on the 25th day of April, 1930, there was duly filed in said court a reply in words and figures as follows, to wit: [114]

[Title of Court and Cause—No. L.-10,465.]

REPLY.

Comes now plaintiff and for reply to the further and separate answers and defenses contained in defendant's answer, admits and denies as follows:

I.

Denies each and every allegation contained in the 12 paragraphs of the denials and of the first cause of action, and in the 12 paragraphs of the denials of the second cause of action, and in the 12 paragraphs of the denials to and of the third cause of action.

II.

Denies each and every allegation contained in said answer filed herein by defendant except such allegations thereof as are in this reply expressly admitted.

And for a reply to the first further and separate answer and defense plaintiff admits and denies as follows:

I.

Admits Paragraph I thereof.

II.

Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs II, IV, V, and VII, except that it is admitted that during the World's War and afterwards the Deutsche Reischswahrung depreciated in value as did also all securities payable in said marks.

III.

Admits Paragraph III thereof, except that plaintiff denies that either or any of said policies were executed by defendant in Germany or pursuant to the laws thereof or that each or any of them was to be performed in Germany or that all payments thereunder were to be made in [115] Germany or that each or any of them is a German contract or subject to be construed according to the laws of Germany, or that defendant still or otherwise keeps or maintains an office anywhere in Germany or an agent for Germany there located or subject to the jurisdiction of its courts, or any other agents or

representatives in Germany upon whom might be or may be served summonses or other judiciial processes issued out of German courts, or that defendant now is subject to be summoned into or within the jurisdiction of the courts of Germany, or otherwise or at all.

IV.

Denies each and every allegation contained in Paragraph VIII thereof, except it is admitted that Section 242 of the German Civil Code provides substantially as quoted in said Paragraph VIII.

V.

Replying to the second further and separate answer and defense plaintiff admits and denies as follows:

Denies each and every allegation contained in Paragraph I thereof.

VI.

Admits Paragraph II thereof, except plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in lines 17 to 25 inclusive of said paragraph or as to whether the provision in said policies quoted in said Paragraph II was inserted therein pursuant to said or any law.

VII.

Denies that plaintiff has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs III, except it is admitted that at the time of the issuance of said policies defendant had and main-

tained offices in Berlin, Karlsruhe and Mannheim, Germany, and had and maintained at Berlin a chief or General Representative for Germany and an Agent at Karlsruhe and at Mannheim.

VIII.

Denies each and every allegation contained in Paragraphs IV and V thereof. [116]

IX.

Replying to the third further and separate answer and defense plaintiff admits and denies as follows:

Denies each and every allegation contained in Paragraph I thereof.

X.

Admits Paragraph II thereof except that it is denied that each or either of said policies was executed by defendant in Germany or was payable in Germany currency at Mannheim, Germany, or that all or any of the terms or conditions thereof were to be performed in Germany in accordance with German law, or otherwise, or that each or either of them was or is a German contract or to be construed by German law, or that defendant now is, or since the year 1921, was domiciled in Germany, or since said time or now maintains an office at Berlin, Germany, or an agent at Mannheim, Germany, upon whom service of process issued out of any of the courts of Germany may be made, or that defendant was since said time or now is, subject to the jurisdiction of the German courts.

XI.

Admits Paragraph III thereof, except it is denied that said Kronos was created or organized prior to March 9, 1922.

XII.

Denies each and every allegation contained in Paragraphs IV and V thereof, except as to the provisions of Articles 14 and 2 of the German Insurance Law of 1901, and Section 91 of the said German Insurance Law, as to which plaintiff denies that he has any knowledge or information sufficient to form a belief and therefore denies the same.

XIII.

Replying to the fourth further and separate answer and defense plaintiff denies as follows:

Denies each and every allegation contained in Paragraphs I, III, IV and V thereof.

XIV.

Denies that plaintiff has any knowledge or information sufficient [117] to form a belief as to the truth of any of the allegations contained in Paragraph II thereof.

XV.

Replying to the fifth further and separate answer and defense plaintiff admits and denies as follows:

Denies each and every allegation contained in Paragraphs I and II thereof, except that it is admitted that the said insurance policies were applied for in Germany, and that insured was at all times and now is a resident, citizen and subject of Ger-

many. As to whether or not the administrative machinery alleged to be provided for or set up in connection with or for the administration of the alleged valorization laws is now at work or functioning or the courts of Germany are open or functioning or otherwise or at all, plaintiff denies that he has any knowledge or information sufficient to form a belief.

And for a further and separate reply to the first further and separate answer and defense set out in said answer, plaintiff alleges the following facts:

I.

In said policies of insurance referred to in the amended complaint and answer it is provided that "This insurance participates in the profits of the Company," and said policies are hereby referred to for the terms and conditions of such participation.

II.

In said policies it is further provided that insured is entitled to receive the cash value of the insurance provided for in said policies in cash provided that insured demanded the same within three months after the existence of any arrears in the payment of premiums. Two of said policies further provides that said cash value shall be computed by multiplying by 100, and the other provides for multiplying by 200, the figure set opposite the number of years the policy had run up to the time of the occurance of the arrears, in column I of the table set out in paragraph 14 of the conditions of each of said policies, plus the unpaid [118] partici-

pating interest of said policies in the profits of the defendant. On December 1, 1922, said policy had run 10 years and the figure set opposite 10 years in column I is 190 marks, which multiplied by 100 equals 19,000 marks, which is equal to $4,531.50, and multiplied by 200 equals 38,000 marks which equals $9,063.00, and the participating interest of said policies in the unpaid profits of defendant on November 10, 1922, was and is the sum of $500.85 each as to two of said policies and $1,001.70 as to the other in American dollars, making the entire cash value of said insurance the sum of $19,129.40. Said policies contain no provision as to where, whether in Germany or elsewhere, said cash value should be paid.

III.

During all the time since the issuance of said policies of insurance defendant has been engaged in the business of issuing similar policies of insurance on similar terms and conditions not only in Germany, but also in England, France, Italy, Sweden, Denmark, Canada, Australia and the United States of America, as well as elsewhere, and the profits to which plaintiff is entitled under his said policies are those which have accumulated from all the business done by defendant everywhere.

The said profits have been kept and ascertained and calculated in books of account of all the business done by defendant, which books of account and the supporting documents, papers and data have always been kept by defendant in its home office at New York City, in the State of New York in the United States of America. And said profits have

been kept, ascertained, calculated, invested and reinvested in values based on the American dollar and in terms of the American dollar. And the larger part of said profits have been earned by defendant in American dollars and in values based on said American dollar.

IV.

At the time of the issuance of the policies of insurance to plaintiff, the German Empire monetary system consisted of various issues of currency such as paper marks, gold marks and metal coins, and the payments due under said policy were payable in legal tender of Germany, which legal [119] tender included gold marks as well as paper marks.

On June 1, 1909, the Deutsche Reichswahrung mark was created and made legal tender, the same being an issuance of paper currency, but the gold mark theretofore existing was not changed but has remained legal tender of Germany ever since the time of the issuance of said policy to the present time.

In August, 1924, said Deutsche Reichswahrung mark was by legislative act of Germany discontinued as legal tender and put out of circulation and was no longer money of Germany.

The profits, the failure to pay which when due is the basis of this action, were never at any time payable in German marks, but were always payable in American dollars.

V.

This action is not to recover either Deutsche Reichswahrung marks or gold marks, or any marks

whatever, but is an action to recover damages in dollars for the failure of defendant to pay said cash value when due, and this cause of action did not arise in Germany, but arose in Oregon when the demand was made by the filing of the complaint.

VI.

It is the settled and established law of Germany announced and declared by its courts of the last resort, having jurisdiction so to do, which has never been repealed, overruled, modified or altered but is still in full force and effect that profits arising out of the contracts of insurance are payable in gold marks or marks based on the gold standard of value and not in Deutsche Reichswahrung marks or in the value thereof. And that whether or not defendant has suffered losses by reason of the depreciation in value of the Deutsche Reichswahrung mark is immaterial because such lossses are figured in and accounted for in ascertaining the net profits earned by defendant; and that such losses are also immaterial and will not be considered except upon a showing of a balance sheet of all the defendant's entire business done everywhere, because such losses in Germany by reason of the depreciation in value of said mark may be compensated and equalized or even exceeded by gains and profits from its business elsewhere. [120]

And for a further and separate reply to the second further and separate answer and defense set out in said answer, plaintiff alleges the following facts:

I.

In the said policies of insurance referred to in the amended complaint there is a provision substantially as alleged in Paragraph II of the second further and separate answer and defense, but the same is an agreement and concession on the part of defendant whereby it agrees, in order to relieve plaintiff from the necessity of suing defendant in New York, that it will appear and defend in any one of the courts of Germany, mentioned in said provision, that plaintiff may choose, at his option, to commence an action against defendant to enforce said policy. There is no provision in said policy, however, limiting plaintiff's recovery to or out of the funds and assets of defendant located in Germany, or requiring plaintiff to sue only in a court of Germany.

II.

During all the time since the issuance of said policies of insurance defendant has been engaged in the business of issuing similar policies of insurance on similar terms and conditions not only in Germany, but also in England, France, Italy, Sweden, Denmark, Canada, Australia and the United States of America, as well as elsewhere, and the profits to which plaintiff is entitled under his said policies are those which have accumulated from all the business done by defendant everywhere.

The said profits have been kept and ascertained and calculated during all of said years in books of account of all the business done by defendant, which books of account and the supporting documents, papers and data have always been kept by defend-

ant in its home office at New York City, in the State of New York, in the United States of America. And said profits during all of said times have been kept, ascertained, calculated, invested and reinvested in values based on the American dollar and in terms of the American dollar. And the larger part of said profits have been, during said years, earned by defendant in American dollars and in values based on said American dollar. [121]

A large part of defendant's surpluses and assets at the time of the commencement of this action were, and now are, located and kept in the States of New York and of Oregon, in the United States of America, in American dollars.

III.

The causes of action sued on in the amended complaint is not to enforce said policy, but is an action for damages in dollars for the failure of defendant to perform said policy and said cause of action sued on in the amended complaint did not arise in Germany but arose in Oregon at the time of the filing of the complaint herein.

IV.

Defendant is a Mutual Life Insurance Company organized and existing under and pursuant to the laws of the State of New York and is doing business in the State of Oregon, under and pursuant to the laws thereof. Heretofore defendant complied with the laws of Oregon concerning the doing of business in the State of Oregon, by foreign corporations and it filed on the 16th day of Feb. 1923,

with the Corporation Commissioner of said State a power of attorney, as required by said laws, which power of attorney ever since has been and now is on file in said office, a copy of which power of attorney is hereto attached and marked Exhibit "ZY," and is hereby referred to for its terms and provisions. Said power of attorney was duly executed by defendant pursuant to a resolution of its Board of Directors and was regularly acknowledged by the designated and authorized officers of defendant.

And for a further and separate reply to the third further and separate answer and defense set out in said answer plaintiff alleges the following facts:

I.

During all the times mentioned in the amended complaint and answer defendant was and is now a corporation organized and existing under the laws of the State of New York and by said laws it was and is now authorized to do a mutual life insurance business and during all of said times [122] it was engaged in the mutual life insurance business.

II.

Defendant's home and principal place of business is in the city of New York in the State of New York, at which place it keeps its books, accounts, surpluses and profits as well as the major part of its assets. Its said surplus and profits are kept in dollars and cents of the United States and not in the medium of payment of any other country.

The dividends and profits of defendant's entire business covering not only Germany but every other

country in which defendant does business including England, Russia, France, Italy, the United States of America, Canada and elsewhere, are calculated and kept in dollars of the United States and have always been so, and are kept and figured in books and accounts located in the State of New York. And defendant's profits and surpluses are invested in values based on the American dollar.

Said defendant, at the time of the commencement of this action had and ever since, has continued to have and now has a large amount of assets and surplusages in American dollars situated in the State of Oregon.

III.

Prior to the year 1921 there was in full force and effect in the State of New York a statute known as Section 89 of Article 2 of Book 27 McKinney's Consolidated Laws of New York, a true and correct copy of which is attached hereto and marked Exhibit "X," which statute has ever since been in full force and effect and has never been amended or repealed.

IV.

During all of the times mentioned in the amended complaint and in the answer there was in full force and effect in the State of New York a law to the effect that all Mutual Insurance Companies were prohibited from any act or transaction which would create any discrimination between its policy-holders of the same class and having the same expectancy of life whereby some would be given advantages not given to others or whereby disadvantages would be imposed upon some and not upon others. [123]

V.

On March 9, 1922, there was created and founded in Germany under the laws thereof, the said corporation, referred to in the answer as "Kronos."

In and by Article IV of the Articles of Incorporation of said Kronos it is provided as follows:

> "The Company takes over the German business of the New York Life Insurance Company according to a transfer contract which is attached to and made a part of these Articles."

VI.

On or about December 31, 1921, and prior to the creation of said Kronos a pretended contract was pretended to be entered into between said Kronos and defendant wherein defendant pretended to transfer to said Kronos its business in Germany and some of its policies issued to German residents and citizens, which said pretended contract was and is attached to the Articles of Incorporation of said Kronos. In and by Article 1 of said pretended contract it is provided as follows:

> "Art. 1. The New York Life Insurance Company hereby transfers to the Kronos and the Kronos hereby accepts all of the insurance contracts which the New York Life Insurance Company, under German laws and provisions issued upon the lives of citizens of Germany, of such persons who have their permanent domiciles there and which were still in *affect of* December 31, 1921, however excepting the following policies:
>
> (a) All policies which were not issued in German legal tender;

(b) All policies of foreigners (including those who through territorial adjustments have become citizens of other states, for instance, Poland, France, Denmark, etc.) except where the owners have given their written consent to such transfer;

(c) All policies of citizens of Germany who now reside outside of said country and have paid their premiums in foreign lands."

VII.

Defendant did not transfer to Kronos any part of its business done and transacted in countries other than Germany nor did it transfer to said Kronos all of its business transacted in Germany, but reserved from [124] said pretended transfer some of its policies issued and payable in Germany to German citizens. Nor did defendant transfer or attempt to transfer to said Kronos all or any of its assets and surpluses which were then situated in countries other than Germany, and especially in the United States of America, which then amounted to and do now amount to upwards of $400,000,000.

VIII.

Plaintiff has never consented to said transfer nor acquiesced therein nor in any way ratified or confirmed the same. Said pretended transfer is the same transfer referred to in said second further and separate answer and defense. Neither defendant nor Kronos gave to plaintiff at any time any security for the payment to him of the demands to come due to him under said policy.

IX.

It is the settled and established law of the Republic of Germany announced, promulgated and declared by the courts of last resort thereof, having jurisdiction so to do, that said pretended transfer is illegal and void in that it fails to transfer all of the business of defendant in Germany, but reserves some thereof from said transfer. It is also the settled and established law of said Republic so announced, promulgated and declared that said transfer does not bind plaintiff nor discharge defendant from any of its obligations under its policy in the absence of the consent of plaintiff to such transfer. It is also the settled and established law of said Republic, so announced, promulgated and declared that a transfer of policies of insurance from one company to another cannot legally be accomplished without giving to the insured security that his demand will be paid by the transferee company.

It is also the settled and established law of said Republic, so announced, promulgated, and declared that a Mutual Insurance Company cannot legally discriminate between its members of the same class and therefore cannot transfer some of its business whereby some of its members will have less security for their demands than other members of the same class.

Said laws have never been repealed, overruled, modified or changed in any way and are now in full force and effect. [125]

X.

By virtue of said laws the alleged and pretended

novation and transfer of business from defendant to Kronos is illegal and void in that all of defendant's business was not transferred to Kronos nor all of its German business so transferred, and because plaintiff did not consent thereto, nor was any security given to plaintiff and because its manifest purpose was, and its effect, if valid, would be to create an unlawful discrimination in favor of policy holders residing outside of Germany and against policy-holders residing in Germany, contrary to the public policy of the German Republic and of the State of New York and of the United States.

And for a further and separate reply to the fourth further and separate answer and defense set out in said answer, plaintiff alleges the following facts:

I.

During all the times mentioned in the amended complaint and answer defendant was and is now a corporation organized and existing under laws of the State of New York and by said laws it was and is now authorized to do a mutual life insurance business and during all of said times it was engaged in the mutual life insurance business.

II.

Defendant's home and principal place of business is in the City of New York in the State of New York at which place it keeps its books, accounts, surpluses and profits as well as the major part of its assets. Its said surpluses and profits are kept

in dollars and cents of the United States and not in the medium of payment of any other country.

III.

The dividends and profits of defendant's entire business covering not only Germany, but every other country in which defendant does business, including England, Russia, France, Italy, the United States of America, Canada and elsewhere, are calculated and kept in dollars of the United States and have always been so; and are kept and figured in books and accounts located in the State of New York. And defendant's profits and [126] surpluses are invested in values based on the American dollar.

Said defendant, at the time of the commencement of this action had, and ever since has continued to have and now has a large amount of assets and surpluses in American dollars situated in the State of Oregon.

IV.

Prior to the year 1921 there was in full force and effect in the State of New York a statute known as Section 89 of Article 2 of Book 27, McKinney's Consolidated Laws of New York, a true and correct copy of which is attached hereto and marked Exhibit "X," which statute has ever since been in full force and effect and has never been amended or repealed.

V.

During all the times mentioned in the amended complaint and in the answer there was in full force and effect in the State of New York a law to the

effect that all Mutual Insurance Companies were prohibited from any act or transaction which would create any discrimination between policy-holders of the same class and having the same expectancy of life whereby some would be given advantages not given to others or whereby disadvantages would be imposed upon some and not upon others.

VI.

Defendant has not surrendered or delivered to any trustee or commission appointed in Germany under said alleged revalorization law all of its assets and surpluses but has reserved and retained a large part thereof outside of the jurisdiction of Germany and in countries other than Germany and especially in the United States of America, in which latter country defendant has surpluses aggregating over $400,000,000.00.

VII.

Defendant has not and does not admit its liability on the policy referred to in the amended complaint and answer and attached thereto, nor does it admit liability on the causes of action herein sued on, and by its said answer has denied all and any liability thereunder or therefor.

VIII.

The causes of action sued on in this action did not arise in [127] Germany but arose in the State of Oregon, at the time of the filing of the complaint herein.

IX.

A large part of defendant's surpluses and assets

at the time of the commencement of this action were, and now are, located and kept in the States of New York and of Oregon in the United States of America in American dollars.

X.

It is the settled and established law of the German Republic as announced, interpreted and declared by its Court of Record and of general jurisdiction, and its courts of last resort, in decisions which have never been repealed, overruled, reversed, modified or altered in any way, but which still are in full force and effect, as follows:

(a) Said revalorization law has no application in a case or action brought to enforce an insurance contract, but only applies where application is made under said law for revalorization.

(b) Said revalorization law has no application in any case where defendant does not admit liability. Where defendant files an answer denying liability said revalorization law is not applicable.

(c) Said revalorization law has no application to a contract to pay accumulated profits or dividends as set forth and contained in plaintiff's said policy of insurance.

(d) Said valorization law has no application to a demand payable in American dollars.

(e) Said revalorization law has no application except in cases where the debtor has surrendered and delivered to the commissioner or trustee appointed under said law, and whose position and

duties are similar to a trustee in bankruptcy, all of his assets, property and surpluses.

(f) Whether or not the debtor has suffered losses by reason of the depreciation in value of the German mark is immaterial in cases on contracts to pay accumulated profits, because such losses must necessarily be figured in and accounted for in ascertaining the profits. [128]

(g) Said revalorization law does not concern itself with the question of liability, but only with the amount admitted to be due.

(h) Whether or not the debtor has suffered losses by reason of the depreciation in value of the German mark is immaterial and will not be considered in insurance cases based on mutual policies, in the absence of a showing by the company of a balance sheet containing all its business transactions everywhere, because its losses by depreciation of the German mark in Germany may be compensated and equalized or even exceeded by gains and profits from its business elsewhere.

And for a further and separate reply to the fifth further and separate answer and defense set out in said answer plaintiff alleges the following facts:

I.

For the sake of brevity plaintiff reaffirms and realleges each and all of the facts alleged in the further and separate reply to the fourth further and separate answer and defense, which is hereby referred to and made a part hereof the same as though set out herein in full.

II.

The Court has no discretion to refuse to take jurisdiction of these causes of action, which causes of action arose in Oregon upon the filing of the complaint.

III.

The principal issue of fact is as to the existence and amount of the profits due, which issue can only be proved by the books, papers, documents and accounts of defendant which are in the United States and kept in the English language.

IV.

The said profits are payable out of the earnings and assets of defendant which were earned and accumulated in American dollars and kept as such by defendant, and said profits became due in American dollars.

WHEREFORE plaintiff prays for a judgment as in his amended complaint prayed for.

C. T. HAAS,
Attorney for Plaintiff. [129]

State of Oregon,
County of Multnomah,—ss.

I, C. T. Haas, being first duly sworn, depose and say that I am the attorney for the plaintiff in the above-named action and that the foregoing reply is true as I verily believe. I make this verification by reason of the fact that the plaintiff is not a resident of Multnomah County, or the State of Oregon,

and that the within action is based upon documents in my possession.

C. T. HAAS.

Subscribed and sworn to before me this 23d day of April, 1930.

[Seal] IDA BELLE TREMAYNE,
Notary Public for Oregon.

My commission expires: 7–10–32. [130]

EXHIBIT "ZY."

APPOINTMENT OF ATTORNEY FOR LEGAL SERVICE.

KNOW ALL MEN BY THESE PRESENTS: That New York Life Insurance Company, a Life Insurance Company duly incorporated under and by virtue of the laws of the State of New York, having its principal place of business in New York, and its principal place of business for the Pacific Coast in San Francisco, has made, constituted and appointed, and does hereby make, constitute and appoint R. A. Durham, a citizen and resident of the State of Oregon, residing at Portland, Oregon, and whose place of business is Board of Trade Building, Portland, its true and lawful attorney-in-fact, for it and in its name, place and stead to make and accept service of all writs and processes in any action, suit or proceeding in any of the courts of justice of the State of Oregon, or any of the United States Courts therein, requisite and necessary to give competent jurisdiction of the said New

York Life Insurance Company to any of the said courts; and he, the said R. A. Durham is hereby constituted the authorized agent of the said New York Life Insurance Company, upon whom lawful and valid service may be made of all writs and processes in any action, suit or proceeding commenced by or against the said New York Life Insurance Company in any of the courts of the State of Oregon, or the United States courts therein, necessary to give said courts or any of them complete jurisdiction of the said New York Life Insurance Company.

GIVING AND GRANTING, unto the said R. A. Durham full power and authority to do and perform every act and thing requisite and necessary to be done in and about the premises, as fully to all intents and purposes as the said New York Life Insurance Company might or could do if personally present, hereby ratifying and confirming all that the said R. A. Durham shall lawfully do or cause to be done by virtue thereof.

IN WITNESS WHEREOF, said corporation has caused this instrument to be executed in its name by its Vice-president and Secretary and its corporate seal to be hereto affixed the 16th day of February, 1923.

(Corporate Seal)

(Signed) THOS. A. BUCKNER,
Vice-President.

(Signed) W. H. PIERSON,
Secretary. [131]

State of New York,
County of New York,—ss.

THIS CERTIFIES, that on this 16th day of February, 1923, before the undersigned, a Notary Public in and for Rockland County, personally appeared the within-named Thomas A. Buckner, the Vice-President, and Wilbur H. Pierson, the Secretary, of the New York Life Insurance Company, the corporation mentioned in and which executed the foregoing power of attorney and acknowledged that they executed the same by the authority and on behalf of said New York Life Insurance Company; and Wilbur H. Pierson, the Secretary of said New York Life Insurance Company, further acknowledged that the corporate seal hereinbefore attached and impressed herein is the corporate seal of said corporation, and was affixed thereto by him.

IN TESTIMONY WHEREOF, I have hereunto set my hand and notarial seal this 16th day of February, 1923.

(Notarial Seal)

(Signed) R. A. CHICHESTER.

Notary Public Rockland Co. Certificate filed in New York County, No. 201. Certificate filed in Bronx County, No. 17. Reg. No. 3195 N. Y. Co. Reg. No. 49 Bronx County.

My commission expires March 30, 1923. [132]

EXHIBIT "X."

Section 89, Art. 2, Book 27, McKinney's Consolidated Laws of New York, reads as follows:

Discrimination prohibited.

No life insurance corporation doing business in this state shall make or permit any discrimination between individuals of the same class or of equal expectation of life, in the amount or payment or return of premiums or rates charged for policies of insurance, or in the dividends or other benefits payable thereon, or in any of the terms and conditions of the policy; nor shall any such company permit or agent thereof offer or make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company or any officer, agent solicitor or representative thereof, pay, allow or give, or offer to give, sell or purchase as such inducement or in connection with such insurance, any stocks, bonds or other securities of any insurance company or other corporation, association or partnership, or any dividends or profits accruing thereon, or any valuable consideration or inducement whatever not specified in the policy, nor shall any person knowingly receive as such inducement, any rebate of premium or any special favor or advantage in the dividends or other benefits to accrue thereon, or any paid employment or contract for

services of any kind or any valuable consideration or inducement whatever, not specified in the policy. No person shall be excused from attending and testifying or producing any books, papers or other documents before any court or magistrate, upon any investigation, proceeding or trial for a violation of any of the provisions of this section, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or subject him to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal [133] investigation or proceeding. No premium upon any policy of life insurance issued on or after January first, nineteen hundred and seven, shall be charged for term insurance for one year, higher in amount than the premium for term insurance for one year at the same age under any other form of policy issued by such corporation; provided that nothing in this chapter shall be so construed as to forbid a company, transacting industrial insurance on a weekly payment plan, from returning to policy-holders, who have made premium payments for a period of at least one year, directly to the company at its home or district offices, a percentage of the premium which the company would have paid for the weekly collection of such premiums.

State of Oregon,
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this 25th day of April, 1930, by receiving a copy thereof, duly certified to as such by C. T. Haas, of attorneys for plaintiff.

A. E. CLARK,
Attorneys for Defendant.

Filed April 25, 1930. [134]

AND AFTERWARDS, to wit, on the 7th day of June, 1930, there was duly filed in said court a motion to dismiss, in words and figures as follows, to wit: [135]

[Title of Court and Cause—No. L.–10,465.]

MOTION TO DISMISS.

Comes now the defendant and upon the pleadings and records filed in this case, and the affidavits of Walker Buckner, Dr. Arthur Burchard, Richard Kruse, and A. E. Clark, filed and submitted in connection herewith, moves the Court for an order dismissing this action and each cause of action stated in the amended complaint for lack of jurisdiction of the subject matter thereof, or, in the alternative, that the court in the exercise of its dis-

cretion decline to accept and retain jurisdiction of this action and dismiss the same.

HUNTINGTON, WILSON & HUNTINGTON and

CLARK & CLARK,

Attorneys for the Defendant.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, this 7th day of June, 1930.

C. T. HAAS,

Attorney for Plaintiff.

Filed June 7, 1930. [136]

AND AFTERWARDS, to wit, on the 7th day of June, 1930, there was duly filed in said court an affidavit of Dr. Arthur Burchard, in words and figures as follows, to wit: [137]

[Title of Court and Cause—No. L.–10,465.]

AFFIDAVIT OF DR. ARTHUR BURCHARD.

State of New York,
County of New York,—ss.

Dr. Arthur Burchard, being duly sworn, says:

I am a Doctor of Laws of the University of Hamburg, Germany, and a German lawyer duly admitted since 1900 to the Bar of Berlin, Germany. Prior thereto I had studied law for eight years in the Universities of Berlin, Munich and Freiburg, Ger-

many, and had also successfully completed the preparatory legal training in the course prescribed by law, including the prescribed years as a referendar in the courts of Berlin, Germany. Thereafter I successfully passed the prescribed regular consecutive State examinations for admission to the Bar and qualification to be a judge for the State of Prussia. After my admission to the Bar in 1900 I practiced law in Berlin, Germany, before all the courts thereof, both of original and appellate jurisdiction, and before various other courts throughout Germany until 1914 and again in 1925 and 1926. Since 1915 I have practiced German law in the United States. I have delivered many lectures and rendered a very large number of opinions on German law. I have testified in numerous actions as an expert on German law before the various Federal and State [138] courts of the United States, particularly in the City of New York, and also before the Federal Trade Commission.

I have written extensively upon German and international law, several of my articles upon those subjects having been published in the American Journal of International Law.

I have given special attention and careful study to the German currency and valorization statutes and decisions.

I am thoroughly familiar with both the English and German languages and have been admitted as a qualified translator for said languages in all the courts above mentioned in which I have given testimony as an expert.

The policies involved herein are expressed to be payable in "mark D. Rwg." The expression "mark D. Rwg." is an abbreviation for "Mark Deutscher Reichswaehrung," and translated means "mark in the currency of the German Reich." The foregoing term or the abbreviation thereof was commonly used in Germany prior to the passage of the Coinage Act of August 30, 1924, for the unit of the then legal tender and circulating medium of exchange in Germany, to-wit, the mark. Of course very frequently simply the expression "mark" was used without further amplification.

The mark (i. e., mark of the German currency or mark D. Rwg.) was the sole circulating medium of exchange and legal tender currency of Germany until the passage of said coinage law of August 30, 1924, which created and established for the German Reich an entirely new and distinct currency called

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the "Reichsmark," making the Reichsmark the sole legal tender currency of Germany and providing for the conversion of the old mark into the new Reichsmark [139] at the conversion ratio of one-million-million of the former for one of the latter.

The mark was established as the unit of the German Waehrung or monetary system by the law of July 9, 1873, the first paragraph of Article 1 of which reads:

> "The currencies of the German States are replaced by the Imperial gold currency. Its monetary unit is the Mark, as it is determined in Article 2 of the law dated December 4, 1871, concerning the coinage of gold coins of the German Empire."

Article 14 of the same law, to-wit, that of July 9, 1873, provided further that beginning from the introduction of the Imperial coinage the following prescription should come into force:

> "Section 1. All payments which until then had to be made in coins of any inland currency, or in foreign coins co-ordinate to inland coins by a German State Legislation, shall be made in coins of the Empire with the reservations mentioned in Articles 9, 15 and 16."

The enactment of the statute of 1873 brought to the German Reich for the first time a uniform monetary system. This system, based as I have stated upon the mark, remained uniform and substantially unchanged until the World War. However, the law of July 9, 1873 (as well as that of December 4, 1871), was recodified by the enactment of the monetary law of June 1, 1909. This law, *inter alia,* provides:

> "Article 1. The currency of the German Empire is a gold currency. Its unit of account is the Mark, which is divided into 100 Pfennig."

Also on June 1, 1909, there was passed a Banking Act, so called, making the notes of the Reichsbank legal tender and obligating the Reichsbank to redeem its notes by payment in German gold coins. I annex, as Exhibit "A" hereto, a true English translation of the relevant portion of said [140] Bank Act of June 1, 1909. Said Bank Act took effect as of January 1, 1910. Thereafter bank-notes issued by the Imperial Bank or Reichsbank became legal tender in Germany. However no change was

created thereby, as the Reichsbank was under obligation to redeem its notes when presented by the owner for gold, and Reichsbank notes, as well as the notes of private banks, had theretofore (since 1875) been commonly accepted as legal tender in Germany. Also no change whatsoever was made in the unit of the German Waehrung or currency system, which continued to be the mark.

In 1914 Germany (like all other nations except the United States, then or thereafter actively engaged in the World War, as well as a number of neutral nations) suspended the redemption in gold of its paper money. This, in Germany, was done by the enactment of the two laws of August 4, 1914. One of these laws contained, *inter alia,* the following provisions:

"Section 1:

Until further notice the provisions of Section 9, Paragraph 2, sentence 2 and 3 of the Coinage Act of June 1, 1909 are amended to the effect that Federal Treasury notes and notes of the Reichsbank can be issued instead of gold coin.

"Section 2:

The Federal Council is authorized to determine the date on which the provisions referred to in Section 1 of the present Act will again become effective.

"Section 3:

This Act becomes effective on the date of publication."

The other of these statutes contained the following provisions:

"Section 1:

Federal Treasury notes are legal tender until further notice. [141]

"Section 2:

Until further notice the Reichshauptkasse is not obligated to redeem the Federal Treasury notes, nor is the Reichsbank obligated to redeem its notes.

"Section 3:

Until further notice the private note banks are authorized to utilize notes of the Reichsbank for the redemption of their notes.

"Section 4:

The Federal Council is authorized to determine the date on which the provisions of Sections 1 and 3 of the present Act shall cease to be of effect again.

"Section 5:

This Act shall take effect with respect to Sections 2 and 3, from July 31, 1914 and in all other respects on the date of its publication."

By the decree of September 28, 1914, contracts made prior to July 1, 1914, calling for payment in gold (i. e., containing a gold clause) were declared not binding for the present. The Reichs Chancellor was to decide as to the date when this decree should become ineffective; and no decree or pronouncement repealing said decree of September 28, 1914, has ever been issued, nor has the suspension of the

redemption of the German treasury bills and Reichsbank gold notes ever been lifted.

Measures of the same kind were taken by almost all other countries, belligerent or neutral. So did France and England (which did not return to its pre-war gold currency for several years after the War), but these countries maintained the old basis and did not change their legal tender. England, of course, restored the pound to its full intrinsic value, but for France it became necessary to stabilize the franc at approximately one-fifth of its former value. Similar measures were applied by the neutral countries—Denmark (August 2, 1914), Norway (August 4, 1914), Switzerland (July 30, 1914), and the Netherlands. [142]

The laws of August 4, 1914, in connection with the subsequent loss of the war by Germany constitute the primary cause of the subsequent catastrophic depreciation of the German mark.

The existence in Germany between the enactment of the monetary law of August 4, 1914, and the coming into effect of the coinage law of August 30, 1924, of legal tender paper currency, is recognized by at least two important decisions of the German Supreme Court, viz.:

(a) That of the German Supreme Court of January 11, 1922, Volume 103, page 386, where the court states:

> "No German gold-currency (Goldwaehrung) within the meaning that currency means system of currency, subsisted any more, since through the Act of August 4, 1914, effective on

the date of its publication, concerning the Treasury-notes of the Empire and the banknotes (Reichsgesetzblatt p. 347), the Treasury-notes of the Empire had been declared to be, until further notice, legal tender (similarly as has been previously decreed as to the notes of the Reichsbank), and, furthermore, since it had been decreed thereby that, until further notice, the Treasury Department was not obligated to redeem the Treasury-notes nor the Reichsbank to redeem its notes."

(b) That of the Bavarian Supreme Court of September 30, 1922, wherein it is stated:

"As a matter of fact, the paper currency (Papierwaehrung) subsists now in the German Empire (Nussbaum, the new German law of Economics, sections 5, 12; Decisions of the Supreme Court vol. 103, p. 386). The basis for the same was laid by the Federal law of August 4, 1914 (Reichsgesetzblatt 347), which released the Reichsbank from its duty to redeem its notes in gold. By an amendment to the Banking Act of the same date (R. G. Bl. 327) the Reichsbank was furthermore permitted, for the purposes of covering one-third of the banknotes, which so far had to consist of gold, negotiable German money or Treasury bills, to use also loan-certificates which, in default of a compulsory rule to generally accept them, can be considered as money tokens only. *Out of a number* [143] *of provisions which clarify the change to the paper currency, the order of September 28,*

1914 (R. G. Bl. 417 should be referred to, pursuant to which agreements, calling for payments in gold, and made prior to July 31, 1914, had been declared to be not binding until further notice. The term "until further notice" has been construed by the German Supreme Court (Decisions, vol. 101, p. 145) as of the meaning: "until a further legislation may determine otherwise." Article 248 sect. 2 of the so-called Peace Treaty should also be referred to, according to which the German Government is not allowed to export gold, nor to permit the export or disposition of same." (Italics mine.)

During this period, to wit, August 4, 1914, to August 30, 1924, no change whatever had been effected in the mark as the unit of the German Waehrung or as the currency and legal tender medium of exchange in Germany. All debts expressed in marks continued to be payable in currency marks, and the currency marks were accepted at the mark's face value without allowing for the depreciation thereof or valorization of the debt. This was not changed when the mark fell in relation to the value of foreign currencies. In fact, during the war the fall of the mark was held within moderate limits; the rapid decline of the mark did not begin until after the conclusion of the World War. However, thereafter, the mark declined rapidly, with the result that in November 1923 one million million marks had a gold value equal to only the pre-war gold value of one mark. This ratio of one million million marks to one mark of standard pre-war gold

value became the stabilized value of the new Rentenmark under the decree of October 15, 1923, for the establishment of the German rentenmark and the suspension of the issue of treasury notes on the part of the government, and for the new Reichsmark under the decree [144] of August 30, 1924, establishing the new Reichsmark.

The legal tender character of the German mark to its full face value without allowing for its depreciation during the period under discussion, to wit, between August 4, 1914 and August 30, 1924, is confirmed by an important decision of the German Supreme Court (the highest court in Germany) handed down on April 16, 1921, and reported in the Official Reports of Decisions of the Supreme Court in Civil Cases Volume 102, page 98. A true English translation thereof is appended hereto as Exhibit "B." Therein the owner of a hotel on January 14, 1913, offered to sell same to plaintiffs for 18,400 marks, or if the property increased in value, for 19,000 marks, provided such offer were accepted prior to October 1, 1922. On March 31, 1920, such offer was accepted at 19,000 marks. At the time of the acceptance of such offer, the value of the property had increased to 52,000 marks and of course the mark itself had greatly depreciated in value. The Supreme Court of Germany held that the defendants (apparently the devisees of the 1913 owner of the property) must accept the 19,000 marks and deed the property to plaintiffs. The court said:

> "The circumstance that the consideration offered to them for the transfer of the property

merely amounts to the purchase price of 19,000 Marks stipulated in the offer, cannot free them from their contractual obligations. This consideration was provided for in the offer and has not changed any more. Merely the ratio of value between performance and consideration has shifted considerably since 1913, in so far as the value of the money has shrunk considerably, whilst the value of the property has increased to almost three times its former value. This extraordinary change in the relation of the values does not however entitle the defendants to disengage themselves from the contract. * * * No decision of the Supreme Court has ever adjudicated to a party the right to withdraw from a contract because by the fulfillment thereof such party would lose a higher price which otherwise it might have obtained." [145]

It was not until the issuance of the so-called Third Tax Emergency Ordinance of February 14, 1924, issued on the strength of the Enabling Act of December 8, 1923, which subsequently has been replaced by the Revaluation Act of July 16, 1925, now in force, that legislation in Germany took cognizance of the problem of valorization of mark-claims and the first legal enactments establishing a legal right to revaluation in specific cases came to pass. These Acts did not change anything in the nature or the value of the mark, but they allowed a legal claim for a definite and prescribed revaluation to certain favored classes of creditors barring thereby any other kind or extent of revaluation to

such creditors. This statutory and exclusive method of revaluation affected in particular the creditors of insurance companies as will be shown later on.

As I have stated above, the enactment of the Monetary Law of August 30, 1924, legislated the mark out of existence as the legal tender and circulating medium of exchange in Germany and substituted therefor an entirely new and distinct unit for the German Waehrung or currency system, to be called the Reichsmark. This Act, viz.: Monetary Law of August 30, 1924, provided also for the conversion of old marks into Reichsmarks at the conversion rate of one million millions of the former for one Reichsmark and also for the settlement of existing mark indebtedness according to such conversion ratio.

I annex as Exhibit "C" hereto and hereby make a part hereof an English translation of said Monetary Law of August 30, 1924. For convenience, however, I note below a summary of the more important provisions of such statute, to wit: [146]

> Article 1: "The currency of the German Reich is a gold currency. Its unit of account is the Reichsmark which is divided into one hundred Reichspfennig."
>
> By Article 2 provision is made for the coinage of gold coins in 20 and 10 Reichsmark pieces and of silver and other smaller coins.
>
> Article 3 provides for the gold content of the gold Reichsmark coin.

Article 4 provides that Gold Coins coined under former monetary laws shall continue until further notice as gold coin of the Reich.

Article 5 provides that thereafter the sole legal tender shall consist of the gold coins coined under the provisions of this law, the other coins mentioned in Article 4 coined under the provisions of the laws of 1871, 1873 and 1909 and the notes issued by the Reichsbank payable in Reichsmarks.

Article 6 provides, *inter alia:* "In so far as a debt may be paid in Marks of the former currencies, the debtor is entitled to effect the payment on the ratio that one million millions of marks are equal (or alike) to one Reichsmark."

An additional statute enacted on August 30, 1924, contains a provision corresponding and supplemental to that of Article 5, *supra,* respecting payment of marks debts in Reichsmarks. This provision, as translated, reads:

"The Reichsbank is bound to call up the total amount of its old notes in circulation and to exchange them for Reichsmarks. One million millions of Marks of former issues shall be replaced by one Reichsmark. The redeemed notes shall be destroyed. Detailed regulations for the calling up of the old notes and for the periods of time to be fixed for their delivery and cancellation shall be determined by the Directorate of the Reichsbank."

Another provision corresponding to the foregoing is contained in Article 1 of the First Decree for the Carrying into effect of the Monetary Law, enacted on October 10, 1924, and provides that one million millions of marks are equal to one Reichsmark.

The foregoing monetary and coinage laws of 1924 became effective on October 11, 1924. [147]

I expressly call attention to the fact that under the 1924 statutes Reichsbank notes to an unlimited amount are legal tender; further that although by the specific provisions of the statute of 1924 the Reichsbank is obligated to redeem its notes in gold, this obligation to redeem does not take effect, according to Section 52 of the Reichsbank Law, until a decision to put in effect those provisions, has been agreed upon between the Board of Directors of the Reichsbank and the General Council and that up to this time no such decision has been made; and also that up to the present no gold Reichsmark coins have yet come into existence.

These laws do not equalize the mark of the old currency (which prior to the War had the same exchange value as the new Reichsmark, but which had depreciated by the year 1923 to one trillionth of its former value) to the Reichsmark of the new currency. After the passage of the Monetary Laws of 1924, the old mark currency (originally a gold currency, but after 1914 under the name of gold currency, merely a paper currency) became a matter of history. The Reich currency is at present exclusively the Reichsmark of the Monetary Law of August 30, 1924. The conversion of the old cur-

rency into the new currency is based upon the ratio of one million millions of marks being equal to one Reichsmark. The old debts in marks remain as such but the debtor has the right to make payment in such manner that one million million marks equal one Reichsmark. Outside of the smaller coins, only paper money is in circulation. The obligation on the part of the Reichsbank to redeem bank notes in gold coin has not yet taken effect.

Accordingly, it is now beyond controversy under [148] the law of Germany, that, apart from the question of revaluation which I shall discuss later, old mark debts are payable on the basis that one Reichsmark is equal to one million millions of marks. As the smallest unit of currency now in force is one Reichspfennig, unless an old mark claim amounts to at least 1/100th of one million millions of marks, that is to say, 10,000 millions of marks, it is too small to be paid in any unit of currency in force at present.

These conclusions, to wit, that debts (unless subject to revaluation according to the principles hereinafter stated) entered into prior to the enactment of the statutes of August 30, 1924, even if the obligation is expressly made payable in gold, are payable in Reichsmarks at the conversion ratio of one million millions of old marks to one Reichsmark are confirmed by several important decisions of the Supreme Court of Germany. These decisions are:

(a) That of June 23, 1927, reported in Volume 118 of the official reports of decisions of the Su-

preme Court, pages 370 et seq., and of which I annex hereto an English translation marked Exhibit "D." Therein the claimant was the holder of debentures with interest coupons for a total of 20,000 marks issued by the Austro-Hungarian State Railways Company and expressed in "Marks of Germany currency." According to the terms of such debentures and coupons, same were payable at the option of the holder "in Vienna or in Budapest at the principal pay office of the Company, in Austrian crowns, at the current exchange rate for 20 mark pieces or at the head offices in Berlin or at Frankfort-on-Main * * * *." The claimant asked that payment be made in Reichsmarks to the face amount of the debentures and coupons sued upon. The German Supreme Court held that the claim [149] should be decided according to German law and that under the Monetary Law of August 30, 1924, the debtor was entitled to effect payment in legal tender in such manner that one million millions of marks are equal to one Reichsmark, and that the question of revaluation was entirely distinct from such question of currency conversion.

In concluding its opinion the Court said:

> "In this connection the subject matter is represented in the first place by the German laws relating to currency. When those legal provisions underwent alterations, the obligation of defendant became subject to the altered provisions, as the defendant as well as the creditor, by agreeing upon payment in German Currency had subjected themselves to German law. Con-

sequently, Article 5, par. 3 of the Monetary Law of August 30, 1924, applies, according to which the debtor, in so far as a debt can be paid in Marks of old currency, is entitled to effect the payment in legal tender in such manner that one million millions of Marks is equal to one Reichsmark.

"The question of the revaluation of the old debt is something entirely different therefrom. In this connection the question of the applicability of German law must also be answered in the affirmative. The cause of revaluation is the depreciation of the German Mark and this question is part of the question as to what does the obligation consist of.

"The amount of a revaluation, if any, cannot be determined in the proceedings in this Court."

(b) That of June 6, 1928, of which I annex hereto an English translation marked Exhibit "E." Therein a Swiss company had on June 2, 1920, remitted to a German bank 2,000,000 marks for investment in time money. The account had not been paid and was sued upon by an Italian national and resident claiming to have been the holder of the account from the beginning. The plaintiff demanded a revaluation of the account.

The German revaluation Law provides, in Section 66 thereof, that claims arising from a loan shall not be [150] revalued if made against an enterprise engaged in the business of loaning money.

The Supreme Court of Germany held that the transaction was governed by German law, that a

revaluation was barred by the afore-quoted provision of the Revaluation Law, and that the plaintiff could recover only the marks of the loan converted into Reichsmarks, according to the statutory conversion ratio. The language of this most recent decision of the German Supreme Court upon the question of currency revaluation is significant. The Court said:

> "In the first place, he (appellant) contends that, according to Art. 4 of the German Federal Constitution, the German laws must be consistent with International Law, that such laws, however, demand repayment of debts arising from loans in the gold-value, which the money, when handed over, has had. It cannot be recognized that there is any rule of International law to this or to a similar effect. In regard thereto, reference may be made to the judicial decisions outside of Germany. The English Courts do not recognize such a rule. In the case which has been referred to in Jur. Woch. (Law Journal) of 1926, p. 222 and 1374, an action was brought for payment of a life-insurance policy in the amount of 60,000 Mark, which has been written prior to the war and the premiums of which had been paid in German marks of full value. The lower court held that payment, which became due in 1922 or 1923, was, under English law, on principle, to be made in paper-marks, that, however, due to incidental circumstances, as certain methods of carrying the accounts and of calculating employed by the company, according to the condi-

tions surrounding that individual case payment in gold marks, nevertheless, could be demanded. The Higher Court, however, has held differently and has determined that payment should be made at the rate of exchange of the German mark at the time of payment. The same principle that a payment agreed to in marks before the new German currency had been introduced, was to be made in paper-marks, has been adhered to in the case of Chesterman Trust vs. Browning (Jur. Woch 1924 p. 744). Similarly a Danish Court has held that repayment of a mortgage recorded in marks was to be made in paper-marks, although the loan had been made before the war in marks of full value (Jur. Woch 1926 p. 617). A Norwegian judgment has held likewise, with slight restrictions (*ibid.,* p. 1043). The additional foreign decisions produced by plaintiff do not contain anything to the contrary. [151] In the judgment of the Cour de Cassation (Supreme Court) of Paris, to which plaintiff refers, a case was concerned where a gold-clause (clause du paiement en or, clause of payment in gold) had expressly been agreed to; in the judgment of the North-American Appellate Court a claim for damages by reason of delay of payment was in question, which claim, from the beginning, had arisen in dollars—i. e., all such cases which cannot be compared with the present case. From the said reasons it cannot be conceded that § (section) 66 is repugnant to the accepted rules of International Law.

* * * * * * * * * *

"The fact then is that the balance of this account in his favor has become worthless through the increasing drabness of the times; but no property of his has been taken by condemnation. No measure taken by any authorities, by which property of his has been taken away from him within the meaning of the Treaties of Commerce referred to, is evident. The motive inducing him to leave his money with defendant, although it became more worthless from day to day, whether he was perhaps hoping for an appreciation of the mark, is immaterial. He had no claim to revaluation according to the facts stated. It follows that through Sec. 66 Rev. Act he has not been deprived of anything to which he already had a claim, the provision of Sec. 66, rather, had merely the effect that such advantages were not granted to him as were granted by the law in cases of a different nature. Consequently, it cannot be said that Sec. 66 is repugnant to the provisions of the German-Italian Treaty of Commerce in any way; and, since the Rev. Act has already been in effect when the Treaty of Commerce referred to was concluded, any such consideration is entirely barred."

(c) That of January 11, 1922, reported in Volume 103, Decisions of German Supreme Court, page 384, and of which I annex hereto a true English translation marked Exhibit "F." On October 18, 1914, the plaintiff gave defendant a mortgage on certain of plaintiff's property as security

for a loan of 55,000 marks, the parties agreeing that all payments should be made "in German gold currency." During 1919 a dispute arose as to whether payment should be made in an amount equal to the value of the loan in Reichs gold coins. On February 5, 1920 plaintiff paid the amount of the loan in paper money. Plaintiff was seeking a decree wiping out the mortgage by reason of that payment.

Defendant claimed that plaintiff was obligated [152] to pay the amount of the debt (55,000 marks) with interest "in German gold currency, i. e., at the rate of exchange of German money at the time of maturity."

It was held that plaintiff was within his rights in paying back the amount of the loan "by making payment in paper money in the face amount" and that by such payment he was free from his debt and entitled to have the mortgage discharged. The Court said:

> "This objection, however, is baseless. No German gold-currency (Goldwaehrung) within the meaning that currency means system of currency, subsisted any more, since through the Act of August 4, 1914, effective on the date of its publication, concerning the treasury-notes of the Empire and the banknotes—R. G. Bl. p. 347—the Treasury-notes of the Empire had been declared to be, until further notice, legal tender (similarly as had been previously decreed as to the notes of the Reichsbank), and, furthermore, since it had been decreed thereby that, until further notice, the treasury Depart-

ment was not obligated to redeem the treasury-notes nor the Reichsbank to redeem its notes."

(This is the same decision mentioned under (a) page 6, *supra.*)

(d) That of the Civil Senate of the Bavarian Supreme Court decided September 30, 1922, and of which I annex hereto English translation marked Exhibit "G." (This is the same decision referred to in (b), page 6, *supra.*) Therein the question at issue was whether a certain mortgage could be registered. The mortgage was expressed in an amount of 5,000 gold marks. The court says that before the War there were 3 kinds of gold clauses, viz.: (1) calling for gold coins in contradistinction from silver coins; (2) the socalled gold coin clause calling for payment in gold coins of the legal tender currency; (3) the socalled gold value clause meaning in substance a guaranty that the creditor will receive as much fine gold as was contained in the ten or twenty prewar mark gold pieces. The court declares that [153] under its decisions a mortgage containing the so-called gold value clause cannot be registered because the amount to be paid thereunder would be uncertain. However, the court also decides that even if the clause in question is a gold coin clause the mortgage cannot be registered because the only currency actually in existence in the German Reich is a paper currency. In addition to the quotation on page 13 the court says:

"Therefore, even if the Coinage Law of the Empire is formally not abolished, the paper-

mark is at present the currency of the Empire when one considers the legal status actually now prevailing. For that reason, claims can be registered in the land-book in paper-marks only. The gold-mark as such is not only no legal tender any more, it is not even recognized as constituting a legal value of account."

(e) That of the Civil Senate of the Reich Supreme Court, decided December 18, 1920, reported Vol. 101, decisions of the Supreme Court, page 141, and of which I annex hereto English translation marked Exhibit "H." Some time prior to 1917, plaintiff secured a loan from defendant, secured by a mortgage upon plaintiff's property payable after 1917 in the amount of marks 460,000. The loan conditions read as follows: "Capital and interest are payable at Zurich in German Reich Currency and as specifically requested by the creditor, in German Reich gold coin." The question at issue was whether the plaintiff could pay off the mortgage by a payment in paper marks, totalling marks 460,000. The plaintiff claimed he could, particularly by reason of the decree of September 28, 1914. The defendant took the position, although under the Order of September 28, 1914, payment in gold could not take place, that under the gold clauses agreed upon between the parties "the plaintiff has to pay back an amount of money which, figured at the rate of exchange, would be equal to the amount of the loan in Reich gold coins." In other words the defendant was willing to take paper marks but only such an amount thereof as would be equivalent

to the [154] value in paper marks of the 460,-000 gold marks.

The Court passes upon the effect of the limiting words reading "until further notice" of the Order of September 28, 1914, and interprets these words as meaning that until further legislation has nullified the Order of September 28, 1914, a gold clause is not binding and a debtor can discharge his debt by paying the amount of the claim in paper marks. The Court concludes: "Therefore, pursuant to the Order of September 28, 1914, the plaintiff was entitled to pay the mortgage of defendant at maturity in paper money in the face amount." Such discharge was expressly held not to be in violation of "good faith."

However, as previously stated, Germany subsequently by legislation granted to certain classes of creditors, including holders of insurance policies, an extrajudicial administrative form of relief, without precedent in the legislation or jurisdiction of any country.

On July 16, 1925, there was passed in Germany a law entitled "Gesetz ueber die Aufwertung von Hypotheken und anderen Anspruechen" (Aufwertungsgesetz). This law appears in the July 17th issue of the Reichsgesetzblatt, Teil I (Law Gazette of the Reich, Part I), No. 31 of 1925. This title is translated as follows: "Law as to the Rating up (Valorization or Revaluation) of mortgages and other claims (Revaluation Law)."

Under said Revaluation Law, no general revaluation (other than the basic right to exchange one million million marks for one Reichsmark) is

granted. In the case of many types of old mark obligations, no revaluation whatsoever has been provided. This was true of bank deposits, certain types of government bonds, etc. Here the holders were offered no relief and remained completely wiped out. On the other hand, mortgages are subject to revaluation within certain [155] limits.

Also, under said Revaluation Law, holders of mark insurance policies are entitled to the form of valorization therein provided, under the particular procedure and machinery thereby set up, but not otherwise. As explained hereinafter, the courts of Germany are without jurisdiction and have absolutely nothing to do regarding claims under said Revaluation Law for revaluation of insurance policies. Such revaluation is provided for only under extrajudicial administrative procedure.

Part Eight, embracing Sections 59–61, deals with insurance claims. I annex hereto a translation of Section 59–61 thereof marked Exhibit "I." There is no doubt but that the policies of defendant involved herein come within the provisions of these sections, as will be shown by the unanimous decisions of the German courts hereinafter mentioned.

Pursuant to Section 61 there was issued on November 29, 1925, an ordinance for the carrying into effect of the Revaluation Law. This ordinance appears in the December 5th issue of the Law Gazette of the Reich (Part I), No. 51 of 1925.

Sections 95–115 deal with insurance claims against private insurance companies.

Section 95 is a statement of the insurance claims which are subject to revaluation in accordance with

the provisions of the law and the ordinance. It is clear that any claim on defendant's policy No. 2507-209 issued to one Adolf Kahn is included in this Section.

Section 96 provides that the reserves, etc., on the policies, such as bonds, etc., are to be computed in accordance with their valorized value under the Revaluation Law, and that as so computed they are to form the basis for the revaluation of the claims of the insured.

Section 97, sub-section 1 provides that the assets of the Company which are to be turned over to [156] the trustee constitute what is called the valorization fund for the insurance written directly by the company as well as for policies which have been transferred to the company, and that to avoid an inequitable result the Supervising Authority may allow the policies transferred to share in the valorization fund of the company with which the insurance was originally written. Subsection 2 of Section 97 deals only with transfers made after February 13, 1924.

Section 97, sub-section 3 states that the valorization fund to be administered by the trustee consists of those assets of the company which are subject to revaluation under the Revaluation Law and were owned by the company on February 13, 1924.

Section 98 deals with pension funds.

By Section 99, certain provisions of the ordinance pertaining to mortgage bonds are made applicable in so far as the valorization fund is composed of mortgages.

Section 100 states that the valorization fund to be administered by the trustee (i. e., the valorized assets of the company) may be increased by a contribution from the general assets of the company.

Section 101, sub-section 1 provides that a portion of the valorization fund may be released to satisfy obligations of the insurance company other than those subject to the Revaluation Law whenever it seems advisable. Sub-section 2 of Section 101 provides for the inspection by the trustee of the books of the company in order to fix the valorization fund. Sub-section 3 of Section 101, a translation of which is hereto annexed, marked Exhibit "J," provides that disputes arising between the trustee and the insurance company as to the valorization fund are to be decided by executive procedure to the exclusion of the courts of law.

Section 102 provides for the prorating of the valorization fund among various kinds of insurance written by one company in proportion to the reserves required to be kept for the particular kinds of insurance.

Section 103 gives the trustee a wide latitude in disposing of claims of the various insured. He may dispose of the claim by an immediate and direct payment from the valorization fund or he may continue the insurance relationship by rewriting the contract with such modifications and alterations as are expedient and he may postpone payment until 1932. All such new contracts made by the trustee are, however, to be payable only in the new Reichsmarks.

Section 104 provides for options as to continuance of the insurance relationship, etc., as to certain groups of insured, particularly as to those whose original insurance was written after January 1, 1919.

Section 105 provides for direct payment out of the valorization fund in certain cases and that if the valorization portion of a particular insured amounts to less than a certain number of Reichmarks, the trustee, instead of paying such amount to the insured, may pay it into a fund to be used to relieve particularly needy cases.

Section 106, 107 and 108 further provide details as to the administration and winding up of the valorization fund. Section 107 further provides that "The plan of distribution and the assets and composition of the valorization fund constituting the basis of such [157] plan are fixed by the approval of the Supervising Authority to the exclusion of court proceedings."

Section 109 has no application to this case since it deals with the foreign currency obligations of a "German insurance concern."

Section 110 provides that the trustee shall be appointed by the Supervising Authority; that he must not be a member of the Board of Directors or an employee, etc., of the insurance company; as to how his remuneration is to be fixed particularly that it is to be charged to the valorization fund; the tenure of his office, etc.

Section 111 provides for the enactment by one of the executive departments of the Government of a statute for a short period of limitation.

Section 112 deals with small insurance associations and has no application to this case.

Section 113 provides that the trustee is an interested party within the provisions of certain sections of the Insurance Supervision Law which provide *inter alia* that when the executive department of the Government charged with the supervision of private insurance makes a decision as to grants to do business, alteration in the business, prohibition to do further business, etc., application may be made to the courts by certain interested parties.

Section 114 provides that the insurance department of the Government, in agreement with the trustee and the insurance company, may provide in individual cases for a different method of adjustment. This is simply a reiteration of the principle laid down in the last part of Section 61 of the Revaluation Law.

Section 115 provides that the provisions of the ordinance are not applicable to foreign insurance companies which are not subject to the supervision of the Reich. The final decision as to whether an insurance company does not come within that category is left to the office of the Supervisory Board of Private Insurance.

I annex hereto, marked Exhibit "J," a true translation of Sections 95 to 115 inclusive of the aforementioned ordinance of November 29, 1925 for the carrying into effect of the Revaluation Law.

To sum up, the German Revaluation Law has changed the legal situation in such way as to give to plaintiffs whose claims under their respective policies and under the German law governing it

had been rendered utterly worthless by the depreciation of the old mark, now a new right expressed in the new German Reichsmark currency, but which cannot be enforced in any court, but solely before particular administrative authorities set up by the said law or the ordinance supplementing it and in a particular procedure regulated in the same way, thereby expressly barring any other kind of revaluation. [158]

I have examined the policy form upon which the policy of the New York Life Insurance Company number 4648273 issued to Henry Heine was written, also that of the policy issued by the same company to said Heine number 4648274, also that of the policy issued by the same company to said Heine number 4648275, being the policies involved in the above entitled action. I have also examined the respective policy forms upon which the several policies of the New York Life Insurance Company involved in the action in this Court entitled Paul Hermann against New York Life Insurance Company number L.—10535 were written. There is no doubt but that each of said policies come within the provisions of the said Revaluation Law of July 16, 1925, and the ordinance or decree for carrying into effect the said Revaluation Law issued pursuant to Sec. 61 thereof on November 29, 1925. This ordinance or decree appears in the December 25th issue of the "Law Gazette of the Reich" (part I) number 51 of 1925.

Section 115 of the Enforcement Ordinance of November 29, 1925 (Exhibit "J," *supra*), provides that only claims against nonsupervised foreign in-

surance companies are excepted from the provisions of the Revaluation Law of July 17, 1925, and the Enforcement Ordinance of November 29, 1925. It is also therein provided that decision as to whether a foreign insurance company is not supervised within the purview of such Revaluation Law and Enforcement Ordinance is to be made by the German Insurance Board and the decision of such Board is final and binding upon the courts.

On October 25, 1928, the German Insurance Board (consisting, as provided by Section 73 of the German Law on Private Insurance, of three members of the Central Board, including the President, and two members of the Committee of Experts) handed down a formal written decision to the effect that the New York Life Insurance Company was [159] a supervised company within the purview of such Revaluation Law and Enforcement Ordinance. I annex hereto, marked Exhibit "K," a true translation of said decision of October 25, 1928.

Appeal was taken pursuant to Section 74 of the German Law on Private Insurance, to the Appellate Division thereby set up to hear such appeals, consisting of three members of the Central Board of Control, including the President, two members of the Expert Committee, one judicial officer and one member of the highest court of administrative jurisdiction in one of the Federal States of Germany. Such court is designated by the German President and its decisions are final.

On February 13, 1929, the aforementioned Appellate Division affirmed the decision of the German Insurance Board of October 25, 1928. I annex

hereto, marked Exhibit "L," a true translation of said decision of February 13, 1929.

Such decision of the Appellate Division of February 15, 1929, is highly significant and important for the following reasons:

(a) No further appeal can be had from such decision.

(Sections 73 and 74 of the German Law on Private Insurance.)

(b) Such decision is final and conclusive and cannot be reviewed by the courts.

(Section 115 of the Enforcement Ordinance of November 29, 1925; Exhibit "J," hereto.)

(c) Decision by the German Insurance Board as to whether New York Life is or is not a supervised company within the purview of the aforementioned Revaluation Law and Enforcement Ordinance was specifically requested by the German courts before which actions against New York Life by its German policy-holders were pending. [160]

(d) The proceedings in many of the actions pending before the German courts against New York Life upon its German policies were, by specific order of the said courts, suspended until a decision upon such question of supervision had been handed down by the German Board of Insurance.

(e) It has been decided by the highest courts of Germany that actions upon insurance policies falling under the provisions of the German Revaluation Law of July 17, 1925 (Including, of course, claims against supervised foreign insurance companies), should not be entertained by the German courts but should be dismissed.

In support of the foregoing, I call to the attention of this Court the following decisions by German courts:

1. On June 8, 1928, the Supreme Court of Germany (the highest court of the German Reich) in Schroter vs. Alte Gothaer Lobensversicherungsbank, had before it an action by a policy-holder of a German insurance company upon a mark policy. The action was dismissed by the Court of Appeals and such dismissal upheld by the Supreme Court. I submit herewith as Exhibit "M" copy of such decision. For the convenience of the Court, however, I note below the more pertinent statements thereof:

> "That, if there is an insurance claim, ordinary proceedings are excluded by Article 107 of the Ordinance of 29th November, 1925. That the plaintiff could assert her claim in ordinary proceedings only upon this claim being excluded from participation in the distribution proceedings by the Supervisory Board. That this was not the case in the specific case, as the defendant was willing to let the plaintiff participate in the distribution of the revaluation fund."

And also:

> "The judgment appealed against does not show any misconception of the principles of law in so far as it rejects the claim because of the inadmissibility of ordinary proceedings. Under Articles [161] 59 et seq. of the German Revaluation Act, in connection with Article 107 of the Enforcement Ordinance of

29th November, 1925, the revaluation of claims based on life insurance policies takes place in a special procedure, to the exclusion of ordinary proceedings in courts."

And finally:

"Since, in conformity with the view of the court below, it appears that no judicial proceedings are admissible, the appeal from the decision of the court below is dismissed."

2. The decision of the Supreme Court of Germany handed down December 13, 1929, in Frensdorff nee Herz against Swiss Life Insurance Annuity Institute of Zurich. Therein the plaintiff sued in the German courts for the revalorization of a policy issued in 1901 for 100,000 marks. The policy upon its maturity in 1922 was paid to its face amount in currency paper marks. The action was dismissed by the Court of Appeals of Hamburg and that decision was affirmed by the German Supreme Court.

The German Supreme Court held that the policy was governed by German law and that consequently paragraphs 59 to 61 of the Revaluation Law and Articles 95 to 114 of the Enforcement Ordinance had exclusive application. Also the Court held that the only policies excluded from the application of those provisions were policies issued by foreign insurance companies which were not subject to the supervision of the German Insurance Department. The Supreme Court also held it to be immaterial that the policy was issued prior to 1904 when the defendant became subject to the

supervision of the German Insurance Department or whether a reserve for the policy in suit was maintained in Germany.

The Supreme Court also expressly held that the only revalorization possible was that under and according to the provisions of the Revaluation Law and that no further or other valorization could be had in the German courts. [162]

The Court held that no legal action could be maintained against the defendant company and that the only remedy available to the plaintiff was under and according to the terms of the Revaluation Act.

I submit herewith as Exhibit "N" copy of said decision of the German Supreme Court handed down December 13, 1929.

3. The decision of the Court of Appeals of Berlin (next to the highest court in Germany) handed down March 12, 1930 in Messerschmitt vs. New York Life Insurance Company. Therein the plaintiff sued on a policy issued by the defendant for 100,000 marks. Upon maturity of the policy in 1924 the insured chose to receive the cash value of the insurance and dividends. The plaintiff claimed that he had been promised payment of the insurance sums in stable currency and sued for the gold value thereof as expressed in Reichsmarks.

Plaintiff's argument in support of this claim is stated by the Court as follows:

> "In support of his standpoint the Plaintiff has stated: that the Defendant is a 'pure mutual insurance company,' and that the policy-

holders are its members; that, accordingly, the total assets of the Defendant are the property of the policy-holders; that the principle of the 'pure mutual company' means that every policy-holder—regardless of his having his residence in America, England, any other country, or in Germany,—has the right to be treated in a way unconditionally equal to that in which all the other policy-holders are treated; that the Defendant in its Prospectus Letters and warranties has always ever again pointed out that it is an international company spread all over the world and that its profits and losses are borne by all its policy-holders conjointly; that the claims, resulting from the policy-holders' membership in the Defendant, as a pure mutual company, must be regarded, from the standpoint of law, as claims arising from a special mutual contract; that they (these claims), as a matter of principle, are not affected by the particular provisions relating to life insurance of the German Revaluation Act, but that, on the contrary, according to sections 62, 63 par. 3 of said Act, they must be judged in accordance with the general provisions of civil law."

The Court of Appeals dismissed plaintiff's claim. The Court said in part: [163]

"The Senate proceeds from the view that the contractual relations of the parties are governed by German law. The contract has been concluded in Germany. The application

and the policy are made out in German language. The Plaintiff was, and is still, a German National, and residing in Germany. The Policy was executed, for and in behalf of the Defendant, also by its Chief Representative for Germany. The amount of the insurance and premiums, both payable in Germany, are expressed in mark-currency; the jurisdiction of the Berlin Courts is agreed upon. Considering all this, there cannot be the least doubt that the parties had in view—and that it was their intention—that German law should govern. * * * As to the laws to govern in cases of conflict of laws, in the first place the consensus of intention of the parties, and after that also the place of performance are of decisive importance. Both show in the present case, no doubt, that German law should govern. * * *

In keeping with this intention of the parties at the conclusion of the contract was also the manner in which the policy has been dealt with thereafter. It was from the beginning kept with the German insurance stock of the Defendant; a premium reserve was constituted for it in accordance with the provisions of the pertinent German laws; the Policy is undisputedly included in the Trustee procedure.

Having regard of all this, there cannot be the least doubt, when considering the terms and conditions of the insurance contract as laid down in the Policy, that the claim con-

cerned herein is a claim arising from a life insurance contract within the meaning of sections 59 et sequ. of the German Revaluation Act and Article 95 or its Enforcement Ordinance respectively, and that this claim arises from a legal relationship entered into prior to February 14, 1924, and that it has for its object the payment of a definite sum expressed in German marks, section 1 of the Revaluation Act and Art. 95 of the Enforcement Ordinance. It is undisputed and a matter of judicial notice that the Defendant is a supervised Company within the meaning of Article 115 of the Enforcement Ordinance; the German Insurance Department has finally and conclusively decided this to be the case. This Decision is binding upon the Court.

Consequently, inasmuch as a revaluation of a mark-claim is involved herein, only revaluation by means of the Trustee procedure can take place; such claim must be d i r e c t e d against the Trustee; the Defendant is not the proper party to be sued therefor. Insofar, as the Plaintiff in the present proceedings tries particularly to prosecute a claim against defendant based on "discretionary" revaluation, his claim must be dismissed, because no such claim exists.

The arguments of plaintiff based upon the alleged claim that defendant had promised payment in stable currencies and based upon the mutuality of

defendant likewise were not upheld by the court. [164]

I submit herewith as Exhibit "O" a copy of the decision of the said Court of Appeals in the Messerschmitt case.

4. The decision of the Court of Appeals of Berlin handed down March 12, 1930, in Hardt vs. New York Life Insurance Company. Therein the defendant was sued upon two policies of insurance issued in 1905 and 1906 for 150,000 marks and 50,000 marks respectively. The policies were what are known as progressive profit participation policies. Plaintiff's suit to secure from the German Courts a revalorization of those policies was dismissed. In its opinion the Court said in part:

> "It must be held that the contractual relations of the parties are governed by German law. * * * There can be no doubt in that regard when taking into consideration the contents and the particular terms and conditions of the policies, which were executed by the Chief Representative of defendant in Berlin as forming part of its German stock, and by which for both parties German places of performance were stipulated.
>
> Plaintiff's argument that defendant has guaranteed to him the continuance of the value of the amounts of the insurance, that, in any event, it has guaranteed full payment of the amounts involved herein in gold marks and that it intends to expressly protect him from losses arising from exchange quotations and decline of the currency, cannot be upheld.

There is absolutely nothing in the policies which, at least, carry the presumption of a complete statement of the whole contractual relationship, to justify such a contention. The fact that the defendant is to be considered a "pure" mutual insurance company, is of no moment in this respect; the nature of the insurances involved as mark-insurances, governed by German law, was not affected thereby. Nothing is said anywhere therein as to a guarantee for losses arising from exchange quotations or currency decline, nor in the prospectuses and propaganda material referred to by plaintiff, which merely show the tendency to have the defendant appear to be a particularly safe and solvent enterprise, spread over the whole world. Also the Annual Reports and Balance sheets of defendant drawn up and issued by it in Germany do not allow to draw any conclusion to the effect that such a guarantee of the continuance of the value of the insured amounts and of the other performances due under the contracts, or a guarantee for losses arising from exchange quotations and currency decline has been given.

As far as the amounts of the main insurances are concerned, claims to revaluation only are available to the plaintiff, and there can be no doubt that such claims are subjected to the trustee-proceedings regarding the defendant. [165]

> The same applies to the claims to dividends. Herein also are involved claims which arise from life insurance contracts resting upon legal relations entered into prior to February 14, 1924, and which have as subject matter the payment of definite sums expressed in mark-currency. * * * Consequently, as to the principal amounts and dividends, merely revaluation claims are available to plaintiff, and only such claims as result from the trustee procedure in conformity with the provisions of the Revaluation Act and the Enforcement Ordinance. As to such claims, defendant is not the proper party to be sued thereon. As far as plaintiff has brought farther reaching claims, they must be dismissed.

I submit herewith as Exhibit "P" a copy of the decision of the said Court of Appeals in said Hardt case.

5. Similar to the Hardt decision, *supra,* is that of the First Chamber for Civil Cases of the Hessian District Court in Mainz handed down January 27, 1930, in Marx against New York Life Insurance Company, copy of which is submitted herewith as Exhibit "Q."

6. The decision of April 15, 1929, of the Court of Appeals of Munich in Protective Association of Holders of Foreign Insurance Policies against Swiss Life Insurance Annuity Institute of Zurich, affirmed by the Supreme Court of Germany by decision handed down February 21, 1930. The action, upon an annuity policy issued to one Haessler, was

brought to secure an adjudication that the defendant was liable for the difference between the amount plaintiff would receive under the Revaluation Law and the "full gold value of the annuities which have become due and are to become due in the future." The defendant is a foreign (Swiss) insurance company for whom a trustee had been appointed under the Revaluation Law by the German Insurance Department.

The policy was issued in 1918 and annuities paid to and including 1922. Subsequently the defendant notfiied Haessler that further payments would have to be sought under the Revaluation Law. The plaintiff contended that the policy was governed by Swiss law; that the defendant, [166] although formally under the supervision of the German Insurance Department, was not a supervised company within the meaning of Article 115 of the Enforcement Ordinance; that the stability of the value of the policy had been guaranteed by representations made by defendant as an inducement to the contract.

The Court of Appeals held:

Haessler's annuity policy, expressed in paper marks, has as a result of the collapse of the mark, become fully depreciated. It is, however, a life insurance contract within the meaning of paragraph 59 of the Revaluation Law, since (a) the contract was made prior to February 14, 1924, and (b) plaintiff's claim calls for the payment of a definite sum of money expressed in marks. Accordingly, the annuities called for by the policy are to be valorized under the provisions of the Revaluation Law

and Enforcement Ordinance thereto. This, the court says, would not be the case if, as contended by plaintiff, (a) the policy was governed not according to German law but according to Swiss law, (b) the claim at issue was a fixed value claim, i. e., a claim which is not hit by the depreciation of the currency, and (c) defendant was not a supervised company within the meaning of Article 115 of the Enforcement Ordinance.

The Court then proceeds to discuss (a), (b) and (c) *supra, seriatim,* substantially as follows:

(a) The policy is governed by German law, although the policy does not expressly so state, for these reasons: (1) defendant had received a concession to transact business in Germany; (2) "the contract was made by the main agent of defendant for Bavaria in Munich"; (3) the obligations of the policy were expressed in German currency; (4) the premiums were paid in Germany; (5) the annuities [167] were paid in Germany and (6) the policy contains a provision to the effect that jurisdiction for suits upon the policy is vested in the Courts of Munich. "To such contracts" the Court says, "German law is applicable." The Court adds, "Were not the contract governed by German law, the Revaluation Law and the Enforcement Ordinance would, of course, find no application but also a valorization according to the general provisions of law (par. 62, Revaluation Law) would not enter into question. (Frankenstein, International Private Law, Volume II, pages 226, 227.)"

(b) There was no agreement as to the stability

of the value of the annuity. The annuity was fixed merely at a certain amount expressed in marks.

Defendant's representations made prior to the issue of the policy, in its circulars, amount only to a eulogy of the financial reliability of defendant, but do not constitute any guaranty of the intrinsic value of the annuities.

(c) The provisions of the Revaluation Law and Enforcement Ordinance do not apply to nonsupervised foreign companies. "In the case of these claims one has to abide by the general provisions of the law, i. e., by paragraph 242 of the Civil Code, provided, of course, as pointed out above, German law is to find application. Whether a concern is to be regarded within the meaning of this provision as not standing under Federal supervision is an issue, the final decision of which rests with the Office of the Federal Superintendent of Private Insurance, the decision to be arrived at by the proceedings contemplated in paragraphs 73, 74 and 84 of the law on the supervision of insurance." (These are the proceedings under which defendant New York Life Insurance Company was found by the German Insurance Department to be supervised.) However, the Court points out that the German Insurance Department [168] has informed plaintiff that there was no necessity for such decision because, unquestionably, defendant was supervised. The Court states that the view expressed by the Insurance Department is correct. "Defendant is actually under supervision since its admission to the transaction of a life insurance

business in Germany in 1904; defendant has still at the present time a main agent for Germany and maintains here an office; a trustee has been appointed." The Court adds "Under such circumstances—also in view of the decisions of the Supervisory Board of Private Insurance in matters concerning the New York Life Insurance Company of New York * * * and in view of the grounds of such decisions—there can be no reasonable doubt that defendant is to be regarded as a concern under Federal supervision within the meaning of Article 115 of the Enforcement Ordinance.

The Court concludes "Plaintiff's claim, which is governed by German law and which arose prior to February 14, 1924, and which bears on the payment of a definite sum of money expressed in marks, is subject, therefore, to valorization as governed by paragraph 59 and following paragraphs of the Revaluation Law and Articles 95–114 of the Enforcement Ordinance. No broader claim can be allowed."

The decision of the Supreme Court of Germany of February 21, 1930, expressly affirms and upholds in every respect the decision of April 15, 1929, of the Court of Appeals of Munich. I submit herewith as Exhibit "R" copy of the decision of the Court of Appeals of Munich of April 15, 1929, and as Exhibit "S" copy of the decision of the Supreme Court of Germany of February 21, 1930. [169]

7. In Daunert vs. The Guardian Life Insurance Company, the German Court of Appeals of Berlin

(24th Senate for Civil Cases) had before it upon appeal a claim by a policy-holder upon a mark policy issued by The Guardian Life Insurance Company. Like the New York Life Insurance Company, the Guardian is an American Company which formerly wrote policies in Germany. In that case, such Court of Appeals decided on July 11, 1928, that the Guardian was a supervised company under the German Revaluation Law and Enforcement Ordinance and that accordingly the legal proceedings should be suspended until the completion of the proceedings under the Revaluation Law and Enforcement Ordinance.

I submit herewith as Exhibit "T" a copy of the decision of the Court of Appeals in the Daunert case. For the convenience of the Court, however, I desire to quote here the following excerpt from such decision, viz.:

> "Since, consequently, revaluation of the life insurance claim of plaintiff cannot take place under the general legal provisions (discretionary revaluation), but solely by means of such proceedings as provided for through the Enforcement Ordinance, and since it is just the amount of revaluation which is in dispute, the determination of the litigation depends upon this amount of revaluation, and therefore it was held to be proper, upon motion of defendant, to order the proceedings to be suspended."

Subsequently, on March 12, 1930, it was held by the Court of Appeals of Berlin that the particular

claim before the court in the Daunert case, *supra*, did not fall under the Revaluation Law for the reason that the particular policy in suit had been issued in Spain and consequently had not been included in the German reserves of the Guardian and had not been subject to the supervision of the German Insurance Department. Otherwise, however, the decision of July 11, 1928, is unaltered.

I submit herewith as Exhibit "U" copy of the decision [170] of March 12, 1930.

8. As early as July 27, 1926, in Blembel vs. New York Life Insurance Company, the District Court of Hamburg held that an action upon an insurance claim governed by the Revaluation Law and Enforcement Ordinance must be dismissed because under the provisions of such laws, only the trustee can decide upon the amount of the revaluation and consequently he alone, in connection therewith, can be sued.

Therein the Court said:

> "In so far as the claims for revaluation fall under the Revaluation Law, only the Trustee, and not the defendant is the party against whom the claim may be prosecuted. For under the provisions of the Ordinance, the Trustee has to ascertain the insurances concerned in a revaluation; his position with regard to the revaluation fund is very much like that of a public receiver in bankruptcy proceedings; and, therefore, the claim has been asserted against him. * * *
>
> "The amount insured is specifically fixed at Marks 100,000. The provisions of the Re-

valuation Law, therefore, apply thereto. As has been said above, the plaintiff can in so far prosecute his claim against the Trustee only, as has been appointed or is to be appointed."

In the Blembel case, the Court apparently assumed that New York Life was supervised, basing such assumption apparently upon the fact that a trustee under the Revaluation Law had been appointed for the New York Life.

9. The Blembel decision, which in effect is a court decision to the effect that the New York Life is a supervised company, is confirmed by the decisions of the District Court or Landgericht I of Berlin on April 25, 1928 (prior, of course, to the decision of the German Insurance Board of October 25, 1928), in Nagel vs. New York Life. In the latter case, an action was brought to recover only the insurance principal of a policy of insurance issued by the New York Life in Germany. An application was made by the plaintiff to be allowed to sue as a poor party. This application was refused, the Court saying:

> "The application of the petitioner [171] to be granted the right to sue as a poor party is dismissed because the intended lawsuit appears to have no prospect of success. The opposing party is a foreign Insurance Company under the supervision of the Reich and therefore a claim for revaluation lies only within the purview of and in accordance with the provisions of the Revaluation Act."

10. In Schubert vs. New York Life the Landgericht I of Berlin, in its opinion of February 15, 1927, stated that where the only question in litigation is the amount of the revaluation, the debtor (therein New York Life Insurance Company) cannot be sued but that the action if justiciable at all, must be maintained against the Trustee appointed under the Revaluation Law.

The significance and effect of the decision of the German Insurance Board of October 25, 1928, affirmed by the Appellate Division thereof on February 13, 1929, upon the question of supervision can readily be inferred from the decree of the Court of Appeals of Berlin entered on January 9, 1929, in Gorgas vs. New York Life. Hundreds of actions upon mark insurance policies issued by the New York Life in Germany are now pending in that country and with very few exceptions, those actions are now either before the Court of Appeals of Berlin or the Landgericht I (District Court) of Berlin, whose judgments are reviewable by said Court of Appeals. On January 9, 1929, the Gorgas case came before said Court of Appeals of Berlin. Said action was in the nature of a test case and decision therein would affect hundreds of other actions. The Court of Appeals, however, being aware of the orders entered in the Gross and Brauer actions, subsequently considered herein, decreed as follows:

> "In so far as the claim is based on revaluation of the insurance amount, the proceedings, in accordance with Section 151 of the German

Code of Civil Procedure, are suspended until the determination of the Appellate proceedings pending with the Federal Board for Private Insurance regarding [172] the Federal supervision over defendant."

In the actions brought before the Landgericht of Berlin by H. W. S. Brauer and Herman Gross, *supra,* the Court of Appeals of Berlin, on January 31, 1928, issued a decree suspending the proceedings in such actions until a decision on the question of the supervision of New York Life under Article 115 of the Enforcement Ordinance to the Revaluation Law had been handed down by the German Insurance Board.

On March 8, 1928, in the aforementioned Brauer and Gross actions, said Court handed down a supplemental decree reading:

"The Insurance Board shall be asked for official information on the question whether defendant, a foreign mutual insurance company, is in the sense of Article 115 of the Enforcement Ordinance to the Valorization Law of November 29, 1925, to be considered as not subject to supervision.

The Insurance Board shall be requested to forthwith issue an administrative decision under Article 115, sentence 3, of the Enforcement Ordinance, because, in the opinion of the Court, the many lawsuits lodged against defendant cannot proceed without such decision and it does not seem opportune that the Court should, of its own accord, render a decision

without first awaiting a decision of the insurance Board, because such a decision of the Court would at any time become void through an opposing position of the Insurance Board."

It was in accordance with the official request of the Court of Appeals of Berlin upon the German Insurance Board made in the Brauer and Gross actions, *supra,* that the decision upon the supervision question made by such Board on October 25, 1928, and affirmed by the Appellate Division thereof on February 13, 1929, was handed down.

I desire also to refer to the decisions of the German courts in Hecht vs. New York Life. [173]

Therein, the plaintiff Hecht sued to obtain a loan upon his policy or an adjudication of his right to obtain such a loan. That action was decided by the District Court of Hesse in Darmstadt on February 3, 1928.

The pertinent portions of such decision read:

"It cannot be seen why the fact of inflation should cause any basic change in this regard only with the exception that defendant in the place of the German paper marks which are not any longer legal tender would either have to pay nothing or would have to pay a revaluation amount computed in Reichsmark. * * * Inasmuch as it is a claim arising out of a life insurance it is subject to the provisions of Sections 59 to 61 of the Revaluation Law. * * * For this reason it is therefore absolutely permissible that the Enforcement Ordinance issued by the German

Government of November 29, 1925, provides among other things as follows in its Article 115; 'The German Supervision Board for Private Insurance shall decide in a final manner as to whether an enterprise within the meaning of this provision is to be considered as an enterprise under German Government Supervision or not; the procedure provided for in Article 101, section 3, applies correspondingly.' Thus it is prescribed in this article that the decision with regard to a preliminary question of fact is vested in the German Supervision Board and must be decided by same in a special procedure of administrative jurisdiction. As long as such a decision has not been rendered, the regular court of law cannot render a decision and therefore must dismiss the complaint. The Court must also dismiss the action for the reason that in accordance with the table the claim is not yet due at all. Therefore the complaint had to be dismissed in every regard."

The decision of the Landgericht of February 3, 1928, was affirmed by the Hessian Court of Appeals of Darmstadt on December 18, 1928. Therein, the contentions [174] of defendant expressly upheld are stated as follows:

"As the currency of 1904 had been changed by the law of August 4, 1914, and had been voided by the Coinage Law of August 30, 1924 (Reichs Law Gazette II, page 254) Art. 5, the claims of plaintiff are subject to re-

valuation. Even though plaintiff therefore could still claim the granting of a loan, such loan would never amount to the sum demanded. Defendant is actually subject to government supervision, as appears conclusively from the decision of the Government Supervision Board of Oct. 25, 1928; the decision, inasmuch as rendered pursuant to Art. 115 III of the Enforcement Ordinance is final and not subject to review. The supervision has never been interrupted. The revaluation of the claims of plaintiff therefore is to take place pursuant to the provisions of the Revaluation Law and not in accordance with general principles; for such revaluation, however, the courts are not competent."

The opinion concludes:

"The District Court, therefore, has dismissed the action rightfully and the appeal of plaintiff must be dismissed, without it being necessary to consider the further allegations of the parties and particularly the motion for suspension of the proceedings."

On December 20, 1929, the Supreme Court of Germany handed down a decision expressly affirming and upholding in all respects the decision of the Hessian Court of Appeals of Darmstadt of December 18, 1928. I submit herewith as Exhibit V copy of the decision of December 20, 1929, of the Supreme Court of Germany.

Another recent decision is that of the Court of Appeals of Berlin handed down February 5, 1930,

in Steffen against New York Life Insurance Company. Therein suit was brought upon a policy for 50,000 Marks issued March 2, 1903. This policy was what is known as a twenty-year accumulation dividend policy. Upon the maturity of the policy, however, in 1923, the insured chose to have the dividends converted into additional premium free insurance, and this was done by defendant's German successor, the Kronos, now called Mannheimer. Plaintiff's suit was dismissed on the ground that both the action upon the [175] principal insurance and that upon the accumulation of dividends (converted as stated into additional premium free insurance) were covered by the Revaluation Law, and accordingly plaintiff had available only the proceedings under such Revaluation Law.

I submit herewith as Exhibit "W" copy of the decision of February 5, 1930, of the Court of Appeals of Berlin.

By reason of the decision of the Supreme Court of Germany of December 13, 1929 in Frensdorff vs. Swiss Life Insurance Annuity Institute, Zurich, *supra,* the decision of the Court of Appeals of Berlin of March 12, 1930, in Messerschmitt vs. New York Life Insurance Company, *supra,* the decision of the same Court of March 12, 1930, in Hardt vs. New York Life Insurance Company, *supra,* the decision of the Supreme Court of Germany of February 21, 1930, in Protective Association, etc. vs. Swiss Life Insurance Annuity Institute, Zurich, *supra,* and sundry other decisions of the German courts, some of the more important of which have been mentioned *supra,* I state unqualifiedly that

the German courts will dismiss any action brought in the courts of Germany against the New York Life Insurance Company to recover any claim based upon the principal amount or any dividends other than possibly unconverted accumulation dividends under any policy issued by the New York Life Insurance Company in Germany and payable in German marks, and will relegate the claimant to his rights under the Revaluation Law and Enforcement Ordinance, and refer him to the special procedure regulated in the said Ordinance. I also state unqualifiedly that under the decisions aforementioned, the German courts would dismiss any action brought in the courts of Germany upon any of the policies involved in this action or in the action pending in this Court entitled Paul Hermann vs. New York Life Insurance Company, No. L.–10,-535, and would relegate the claimant [176] to his rights under the Revaluation Law and Enforcement Ordinance and the said special procedure. As stated above, hundreds of actions based upon mark policies issued in Germany by the New York Life Insurance Company are pending before the German court; but as has also been previously shown, the German courts before deciding upon such claims have awaited a final decision by the German Insurance Board upon the question of the supervision of the New York Life Insurance Company. Prior to such decision, however, the German courts have clearly indicated, as I have hereinbefore shown by quotations from the decisions thereof, that should the decision of the German Board of Insurance be that New York Life Insurance Company is a super-

vised company within the meaning of Article 115 of the Enforcement Ordinance, the German courts will, as was done by the Supreme Court in the Schroter action, *supra,* dismiss the action and relegate the claimant to proceedings under the Revaluation Law before the Trustee. Since the final decision of the Court of Appeals for the review of decisions by the German Insurance Board handed down on February 13, 1929, the German courts have in the Messerschmitt, Hardt, Marx and Steffen actions, *supra,* actually dismissed actions brought in Germany against the New York Life Insurance Company upon mark policies issued in Germany on the ground that the claimant's rights were exclusively those under the Revaluation Law and Enforcement Ordinance. Each of the decisions just mentioned, to wit, Messerschmitt, Hardt, Marx and Steffen has been affirmed by the Court of Appeals; and it is clear from the decisions of the Supreme Court of Germany in the Schroter, Frensdorff, Hecht and Protective Association, etc., vs. Swiss Life Insurance Annuity Institute, Zurich, *supra,* that the afore-mentioned [177] decisions of the Court of Appeals are in accord with the views of the Supreme Court of Germany and will be affirmed by that Court if appealed thereto. There remains open in Germany only the question as to whether an action for accumulation dividends (apart and distinct from an action to recover the principal or main insurance of an accumulation dividend policy) is subject to the Revaluation Law. That question has not been finally decided by the German courts but is now pending before the Supreme Court of Ger-

many. It should be noted, however, that where such accumulation dividends have been converted into premium free insurance, such converted accumulation dividends fall under the Revaluation Law. (See Steffen and Hecht decisions, *supra.*) Note also that where the accumulation dividends have been paid prior to the catastrophic depreciation of the German mark in 1923–24, revalorization other than under the Revaluation Law is not granted by the German courts. (See decision of Superior Court of Berlin, on November 26, 1929, Bennboldt-Thomsen vs. New York Life Insurance Company, copy of which is submitted herewith as Exhibit "X.")

In concluding this portion of my affidavit, I wish to point out that no German court, in any of the hundreds of actions prosecuted before those courts, seeking an adjudication of the claims of the former German policy-holders of New York Life Insurance Company, has ever awarded a recovery in Reichsmarks upon the principal or main amount of such insurance; in all those actions, whereever a decision has been rendered, the German courts have in effect, as has been indicated from the decisions I have hereinbefore cited, relegated the claimant to proceedings under the Revaluation Act, or have suspended the legal proceedings until a decision upon the question of supervision should be rendered by [178] the German Insurance Board, with the obvious intention as indicated in the foregoing decisions, and as has actually been done in some of the aforementioned actions, of thereafter dismissing the action and relegating the claimant

to proceedings under the Revaluation Law, should such decision be to the effect of the decision since handed down, that New York Life is a supervised company within the meaning of such laws.

Unless revalued, of course, such a judgment would obviously be not worth entering, because of the conversion ratio fixed by the Coinage Laws of 1924, of one million millions of old marks for one Reichsmark.

I wish to reiterate and emphasize that no German court has ever awarded recovery upon the basis that a debt or obligation contracted in or calling for the payment of marks of the old mark currency entitled the creditor to receive or recover in payment Reichsmarks of the currency established by the legislation of August 30, 1924, upon the basis that one mark of the old currency was equal to one Reichsmark, or upon any basis (except under the Revaluation Law) other than that one Reichsmark is equivalent to one million millions of the old mark currency. That such is the established German Law is confirmed by the decision of the Supreme Court of Germany of June 23, 1927, reported in Volume 118, of the official reports of decisions of the Supreme Court, p. 370 et seq. (See p. 12 et seq. of this affidavit and Exhibit "D" hereto attached; also p. 29 et seq. of this affidavit and Exhibits "R" and "S" hereto attached.) These are similar to numerous other decisions of the German courts. So established is this construction of the German law that since this said decision of the Supreme Court of June 23, 1927, I do not

think any German lawyer could be [179] found who would present to any German court the contention that, aside from revaluation, under the Revaluation Law and the Enforcement Ordinance or decree of November 29, 1925, and through the administrative machinery there set up, debts or other obligations contracted or expressed in or calling for payment in marks of the old currency entitle the creditor to payment in Reichsmarks except on the basis that one Reichsmark is equivalent to one million million marks of the old currency.

I have been asked to interpret under German Law the so-called jurisdictional or domicile clauses of the policies involved in this action and those in the action entitled Paul Hermann vs. New York Life Insurance Company, L.–10,535. Those clauses usually are headed "Legal Domicile." In one of the policies such clause reads "Legal Domicile: As to performance of this contract, only the courts at Stuttgart shall have jurisdiction; as Legal Domicile for the Company, its business office at Stuttgart is appointed, and for the insured, and the beneficiary, the place designated in the application for insurance."

I have studied the jurisdictional and domicile clauses in the other policies involved in this action and in the aforementioned Hermann action. I believe that all of such clauses would be interpreted alike by the German courts and as thus interpreted would provide for exclusive jurisdiction in the courts specifically mentioned in such clauses.

For convenience I will, however, consider sepa-

rately the clause hereinbefore quoted mentioning the courts of Stuttgart. In my opinion such paragraph or subdivision [180] provides that the parties have agreed that the courts at Stuttgart, Germany, are to have sole and exclusive jurisdiction over any suit brought to enforce or fulfill the provisions of such policy; and in my opinion such paragraph or subdivision would be interpreted as above stated should such question be presented for decision before the German courts.

I have also been asked whether such a provision in a contract providing for exclusive jurisdiction in a certain court over controversies arising under such contract would be enforced by the German courts. The answer is in the affirmative. Several paragraphs of the German Civil Procedure Act deal with the question of jurisdiction. While there are provisions distributing jurisdiction according to residence, domicile and other requisites, there is also provision made that parties may agree beforehand that dispute arising out of certain contractual or other relations shall be exclusively brought before a certain court of first instance only. In certain cases, like divorce and real estate, the parties cannot validly agree on a court of their own choice but must apply to the court provided for by statute.

There is, however, no such restriction fixed by law as to insurance contracts. In all such cases the courts will respect an agreement of the parties to a contract that one specified jurisdiction shall have sole jurisdiction of all controversies arising under such contract.

The agreement embodied in said clause headed "Legal Domicile," providing for exclusive jurisdiction in the courts of Stuttgart over all disputes arising under said insurance contract is a perfectly valid arrangement and would be enforced by the German courts. If an action under [181] such policy or to enforce any of the provisions thereof should be brought in Germany elsewhere than before the courts at Stuttgart, such court would refuse jurisdiction on the ground that only the courts at Stuttgart have jurisdiction over such controversy.

If the situation should be reversed and suit should be brought in Germany involving an insurance contract made in the United States between a policyholder therein domiciled and a German insurance company transacting and authorized to transact business in the United States, which provided that only some specified court in the United States should have jurisdiction over controversies arising under such policy, the German court asked to assume jurisdiction over such controversy would be obligated to dismiss such suit on the ground of lack of jurisdiction.

In support of the foregoing, I cite the following decisions of German courts, all rendered in actions against this defendant, New York Life Insurance Company, viz.:

1. That of Dessau, handed down by the Landgericht of Berlin, on May 17, 1924. Therein, although the insured was a German citizen, the jurisdiction fixed by the policy was that of Paris. From

1916 on the premiums were paid in Berlin. The plaintiff claimed that he should not be held to the jurisdictional clause of the contract especially because French judgments were not recognized in Germany and because French courts would not recognize a clause giving jurisdiction only to German courts.

The court holds that exclusive jurisdiction has been fixed by the contract in the courts of Paris and this agreement should be upheld regardless of the fact that French judgments would not be recognized in Germany. The [182] court points out that it is entirely competent for defendant to put a clause in its policy to the effect that only the courts of Paris should be competent.

I annex hereto as Exhibit "Y" copy of said Dessau decision.

2. That of Danner handed down by the Landgericht of Berlin, on June 28, 1926. Therein a clause in a policy substantially reading as the clause now under consideration granted exclusive jurisdiction to the courts of Berlin. The court held that under such clause the jurisdiction of the Berlin courts had been agreed upon and such clause as thus interpreted was enforced and upheld.

3. In the Gorgas decision, page 30, *supra,* the policy although issued in Sofia, Bulgaria, contained a clause granting exclusive jurisdiction to the courts of Berlin and such clause was upheld by the German court.

4. In that of Rinck, the question was passed upon by the Court of Appeals (i. e., Kammergerich)

of Berlin on November 2, 1927. Therein a policy was issued in Madrid to the plaintiff, a German citizen then domiciled in Madrid. The policy was in the Spanish language and provided for insurance expressed in pesetas. The policy contained a jurisdictional clause substantially in the form of the clause under consideration granting exclusive jurisdiction to the courts of Madrid, Spain.

During the first ten years of the policy, plaintiff paid his premiums in Spanish currency. In 1912, however, having removed to Berlin he applied for and was granted permission to pay his premiums in Berlin in marks and thereafter not only were the premiums paid in marks but he secured a loan from the company paid in marks. [183]

The Court of Appeals of Berlin held that the policy was subject to Spanish law and that only the courts of Madrid, Spain, had jurisdiction of suits thereon and accordingly dismissed the complaint.

I annex hereto as Exhibit "Z" copy of said Rinck decision.

In conclusion I wish to point out and emphasize that in every action brought in Germany upon a policy of life insurance like that involved iu the present action (i. e., a policy of life insurance issued in Germany and payable in German marks), the German courts have held that such policy and the obligations thereof and the rights thereunder are governed exclusively by German law. I could recite in support of the foregoing proposition a

very large number of German decisions. For brevity I will mention but four decisions, all of them regarding policies like that involved in the present suit and in all but one of which the New York Life Insurance Company is the defendant.

These decisions are:

(1) The Blembel decision (page 29, *supra*). Therein the court said:

> "The Claimant takes the view that the insurance contract entered into between him and the Defendant is governed by American law. This is contrary to what the Supreme Court has held in the matter of the Defendant against G., where the Supreme Court has declared that the German law should govern because the contracts have been entered into in Germany and are also to be performed in Germany. The consistent doctrine of the Supreme Court that in contracts involving obligations the law of the place of performance shall govern, is to be upheld (see decision of Supr. C. vol. 95, p. 165). As, according to the policy, the amount insured is payable in Hamburg at the office of the Defendant, German law, therefore, must apply."

(2) An easier decision in the Hecht action (pp. 36–38, *supra*) of the Landgericht at Darmstadt handed down October 30, 1925. [184]

Therein the court recited that the policy is governed by German law inasmuch as "the insurance contract, in accordance with the policy, is to be performed in Germany; consequently, in accordance with the principles of international private law, be-

sides the express terms and conditions of the contract, the relations of contending parties in their capacities as creditor and debtor are governed solely by the provisions of German law."

(3) That of the Landgericht of Berlin handed down December 19, 1927, in the Gorgas action (page 35, *supra*). Therein the court said:

> "To the insurance contract entered into between plaintiff and defendant German law must be applied, inasmuch as Berlin has been agreed upon as the place of jurisdiction, as the insurance terms are in German and as the premiums were payable in German currency.
>
> "It must be assumed from this that the parties proceeded from the view point that the German law was governing."

(4) I also wish to refer to the decision of April 15, 1929, of the Court of Appeals at Munich in Protective Association of Holders of Foreign Insurance Policies vs. Swiss Life Annuity Institute, Zurich (pages 29–32, *supra*). Policies were issued by said Swiss Company in Germany payable in marks under a concession from the German Government, similarly to the policy in suit issued by defendant. In the aforementioned decision the court said:

> "Grounds as to the contention a): The question as to whether German law is to apply to the insurance contract of December 16, 1918 has been answered in the affirmative by the court below with proper grounds. If the contract were

not governed by German law, the Revaluation Law and the Enforcement Ordinance would, of course, not apply, but likewise no revaluation (Sect. 62 Revaluation Law) could occur on general rules of law (Frankenstein, International Private Law, Volume II, Pages 226 and 227). The contracting parties were at liberty to submit to a specific system of law in advance by an agreement in the form of a legal transaction. They have not done so explicitly. It is possible, [185] however, to establish their virtual agreement or at least such agreement as is to be assumed. Defendant has been admitted to the transaction of business in Germany. The contract in question was made by the main agent of defendant for Bavaria in Munich; the sums to be paid were set forth in German currency; at Munich Haessler paid the 12,000 M. and at Munich were paid to him by the defendant, through defendant's main agent, the annuities in the years 1919, 1920, 1921 and 1922; as to actions and suits arising from this insurance business transacted and performed in Germany, jurisdiction was vested in the courts of the place of the German business office of defendant, i. e. Munich. (Sect. 89 Revaluation Law.) To such contracts German law applies. It can be assumed, without any further proof, that it was the intention of the parties to submit to German law. The paramount and controlling intention of the parties is apparent from the insurance con-

tract and from the policy. (Federal Supreme Court 118,282—Konige-Peterson commentary note 1 (in fine) to Sect. 88, note 4 to Sect. 86 and note 14 to Sect. 59 of the Revaluation Law; Staub, commentary to the Commercial Code, note 6 to Sect. 372, Appendix, Decision of the Federal Supreme Court of March 12, 1928 Jur Woch, (Law Journal) 1928, Page 1196). If, as plaintiff contends and attempts to prove, the intention of the parties had been that the policy was not to be governed by German law, but Swiss law was to be applied to the policy, this ought to have been indicated in some manner in the application for insurance or in the policy. Both show, however, as has been pointed out above, that the reverse must be inferred from them, i. e. an agreement to the effect that German law was to apply.

Plaintiff himself does not contend that the intention as alleged by him has been expressed during the negotiations for the contract or in the contract itself. He merely contends that it was the intention that Swiss law should apply. Controlling is, however, not any intention of the parties not expressed, but their manifested will. This, as pointed out above, leaves no room for any doubt that the German law must apply."

The exhibits submitted herewith are true translations of the German text.

DR. ARTHUR BURCHARD.

DR. ARTHUR BURCHARD.

Sworn to before me this 9th day of May, 1930.

WILLIAM LEO MULRY.

[Seal] WILLIAM LEO MULRY,

Notary Public, Kings County No. 294, Kings County Register No. 2333, Certificate Filed in New York County Clerk No. 758, New York County Register No. 2–M–531.

My term expires March 30, 1932. [186]

EXHIBIT "A."

Act of June 1, 1909, Concerning Amending the Banking Act of March 14, 1875.

Article 3:

The notes of the Reichsbank are legal tender. Otherwise the provisions as contained in § 2 of the Banking Act shall remain unaffected. [187]

EXHIBIT "B."

TRANSLATION.

Abstract from the Orficial Report of the Decisions of the Supreme Court at Leipzig, volume 102, pages 98 sequi.

Decision, rendered by the Fifth Court for Civil Cases, and on April 16, 1921, in the case of P. . . . . & Co. (Claimants) vs. M. & Conserts (Defendants)—V. 484/20.

The devisor of the defendants, the hotel keeper

M., made to the Claimants, on January 4, 1913, an offer, recorded before justice, for the sale of his property situate in W. and registered in the Land Register under No. 199a. The purchase price was to be 18 400 Marks; should the property, at the time when the sale was made perfect, have acquired a considerably higher value than it had at the time the offer was made, this price—as provided for in Article 3 of the recorded offer—was to be increased up to 19 000 Marks. According to Artice 4 M. bou*u*nd himself to this offer until October 1, 1922. On March 31, 1920, the claimants accepted the offer in a deed recorded before justice and agreed to pay a purchase price of 19 000 Marks. On April 12, 1920, this acceptance was notified to the defendants. The claimants introduced an action for the defendants being ordered to agree to the transcription in the name of the claimants of the property W. No. 199a. against payment of 19000 Marks. The District Court granted this petition, the Appellate Court rejected it. Upon appeal lodged by the claimants with the Supreme Court, the decision of the Appellate Court was reversed and the appeal of the defendants against the decision of the District Court nonsuited.

MOTIVES.

. . . . . .

The appeal cou*n*d not remain without success.

. . . . . .

The devisor of the defendant, in 1913, had offered to the claimants to sell to them a property at a price of 18 400 Marks, or, at best, of 19 000 Marks,

and he had bound himself to this offer until October 1, 1922. When the claimants, in March, 1920, accepted this offer, the value of the property had increased to 52 000 Marks. If now, the claimants demand of the defendants their agreement to the transcription of the property, the performance demanded from the defendants is by no means altered or more difficult to fulfill. Any aggravation of their performance, even only from an economic point of view, can be accepted all the less, as the devisor of the defendants, already in 1912, had let his house on hire to the claimants, [188] and these latter had since then uninterruptedly been the tenants of the property. The circumstances that the consideration offered to them for the transcription merely amounts to the purchase price of 19,000 Marks, stipulated in the offer, cannot free them from their contractual obligations. This consideration was provided for in the offer, and has not changed any more. Merely the relation between performance and consideration has shifted, insofar as the value of the money has shrunk considerably, whilst the value of the property has increased to almost three times its former value. This extraordinary change in the relation of the value does not, however, entitle*d* the defendants to disengage themselves from the contract. They could, then as before, dispose of the property; the shifting in the relating between performance and consideration, which in specie was not necessitated by war or revolution but depended solely on the will of the parties, cannot be considered as a circumstance equivalent to an impossibility. In specie, the acceptance of the

offer only in 1920 and the exchange of performance and consideration have only for result that the price increase, the real extent of which was not foreseen, was profitable to the claimants, and that the acquisition became a most advantageous bargain for them. To this effect, however, the devisor of the defendants had exposed himself, when making his offer. He also realized this, as appears from Article 3 of the contract; for, the case of an increase of the value of the property is expressly provided for therein, and allowance is made for such increase by an increase of the purchase price. Only such an increase of the value of the property, as that occasioned by the war and its consequences, had not been thought of. The defendants merely lose the higher price which they could have obtained had their devisor in 1913 not divested himself of his right to dispose of the property until 1922. No decision of the Supreme Court has ever adjudicated to a party the right to withdraw from a contract, because by the fulfillment thereof such party would lose a higher price which, otherwise, it might have obtained. Such right can neither be granted to the party from the standpoint of the *clausula rebus sic stantibus,* because then the point of view could not be adopted that the fulfillment of the contract could not be exacted from it on account of the economic circumstances. Moreover, the appeal rightly points out that the defendants and/or their devisor would have come into exactly the same position, had the claimants accepted the offer at some considerably earlier date. Then also the increase of the price would have been

to the exclusive benefit of the claimants. This eventuality (though it has not happened) shows just that the offer of the devisor would have had the same economic result of prejudicing the defendants. Under this long-timed contract the defendants in the event of the acceptance of the offer could never draw any noteworthy profit from a considerable increase of the price, as their devisor had of his own accord limited this profit, in Article 3, to 600 Marks. It is not to be conceived in how far the claimants act against faith and credit, when—in their favourable contractual position conceded to them by the offer,—they made use of their right to acquire the property (which right had always been open to them) within the delay provided for in that offer, even after the considerable increase of the property prices had set in, and when, doing so, the claimants definitely secured to themselves the advantage resulting from this increase, which advantage they had been entitled to, conditionally, from the beginning. In the interest of the legal security the maxim that contracts must be observed must be upheld also as regards long time contracts, unless, in some individual case, quite exceptional circumstances should require a deviating judgment. * * * [189]

EXHIBIT "C."

MONETARY LAW, DATED AUGUST 30, 1924.

Article 1.

The currency of the German Reich is a gold currency. Its unit of account is the Reichsmark which is divided into one hundred Reichspfennig.

Article 2.

As coins of the Reich shall be coined:

(1) as gold coins: Twenty Reichsmark pieces and Ten Reichsmark pieces;

(2) as silver coins: pieces for amounts of from One to Five Reichsmarks;

(3) pieces of 1, 2, 5 and 10 Reichspfennig.

Article 3.

In coining the gold coins from one kilogram of fine gold are coined

139 42 pieces of 20 Reichsmark each or

279 pieces of 10 Reichsmark each.

The proportion of the composition is 900 parts of gold and 100 parts of copper. The form of the coins is determined by the Federal Minister of Finance; the decree dealing therewith is to be published in the Reichsgesetzblatt (Official publication of the laws).

The proportion of the composition for the silver coins, and the material and proportion of composition for the Reichspfennig coins, shall be determined by the Federal Minister of Finance with the approval of the Federal Council (Reichsrat); weight and form of these coins are determined by the Federal Minister of Finance. The decree dealing with these points shall be published in the Reichsgesetzblatt. [190]

As gold coins of the Reich, until further notice, are considered: The gold coins coined under the Law concerning the coining of gold coins of the Empire, dated December 4, 1871, (published in the Reichsgesetzblatt, page 404 sequ.), the Monetary

Law of July 9, 1873, (Reichsgesetzblatt, page 233) and the Monetary Law of June 1, 1909 (Reichsgesetzblatt, page 507).

As silver coins, until further notice, are considered also the silver coins coined under the law concerning the coinage of new silver coins of the Reich, dated March 20, 1924 (Reichsgesetzblatt I, page 291).

As coins of the Reich, expressed in Reichspfennig, until further notice are considered also the Rentenpfennig coins, coined under the Decree of the President of the Reich, dated November 8, 1923, (Reichsgesetzblatt, Part I, page 1086) and the copper coins coined under the Monetary laws of July 9, 1873, and June 1, 1909.

Article 5.

Sole legal tender are henceforth:

(a) the gold coins designated in Articles 2 to 4 hereof and the notes, issued by the Reichsbank, payable in Reichsmark, to an unlimited amount,

(b) The other coins designated in Articles 2 to 4 hereof, according to the provisions of Article 9,

it being understood that, as regards the gold and silver coins designated in Article 4, one Mark nominal value is equal to one Reichsmark, and, as regards the Rentenpfennig coins and the copper coins, one Rentenpfennig and one Pfennig nominal value are equal to one Reichspfennig.

In so far as a debt may be paid in Marks of the former currencies, the debtor is entitled to effect

the payment on the ratio that one million millions of Marks are equal (or alike) to one Reichsmark. [191]

EXHIBIT "D."

Abstract from the Official Report of Decisions of the Supreme Court, Volume 118, Pages 370 sequ.

IV. Court for Civil Cases, Decision of June 23, 1927, in the case of Priv.osterr.—ungar.Staatseisenbahn—Gos.(Defd.) vs. W. . . . . (Claimants). IV. 592/26.

The claimant, is holder of debentures, with interest coupons, for the total amount of 20,000 Marks, which debentures belong to the 4% Loan, raised by the Austro-Hungarian State Railways Co. in 1883 and are expressed in "Marks of German currency." According to the terms, printed also on the coupons, the payments shall be made "in Vienna or in Budapest at the principal pay office of the company, in Austrian Crowns, at the current exchange rate for 20 Mark piece (the French text says: "pieces d'or de 20 Marcs"), or at paying offices in Berlin or at Frankfort on Main, to be designated by the Board of administration." With the claim lodged in summary proceedings, the Claimant required payment of interest instalments in an amount of Reichsmarks corresponding to the face value of the coupons, and moved for the defendant company being ordered to pay 3600 Reichsmarks, in German or Austrian currency, at the option of the defendant. The District Court (court of first instance) partly nonsuited the claim on the plea of prescription, and

for the rest admitted it. Both parties lodged an appeal against this decision. The claimant enlarged her claim by further interest instalments. The Appellate Court substantially admitted the appeal of the claimant and rejected the appeal of the defendant, reserving to that letter its rights (to appeal to the Supreme Court). Upon [192] the appeal of the defendant to the Supreme Court, the decision of the Appellate Court was reversed and the matter committed for renewed trial.

MOTIVES.

It must be supposed that the litigious coupons, as well as the underlying debentures, are issued in Marks of German currency, and that, according to the terms printed thereon, the payments should be made (1) in Vienna or in Budapest, in Crowns, at the current exchange rate for Twenty Mark pieces, (2) at paying offices in Berlin or at Francfort on Main, in German Marks. As the Appellate Court states, this arrangement was made in view of the small confidence the German investors placed in the Austrian currency, for the purpose of securing the performance from the influence of (fluctuations of) that currency; the necessity of securing the creditors against a deterioration of the German currency was not thought of, by neither of the parties, this latter has, on the contrary, been considered to be absolutely reliable. From this supposition results forthwith, also as supposition of the Appellate Court, that the German Mark currency was intended to serve as standard for the substance of the liabilities of the defendant. It (the German

Mark currency) became the substance of the contract, entered into by the parties through the acquisition of the debentures by the claimant.

The further question as to what influence the deterioration of the German Mark currency and its subsequent replacement by a new currency had on the purport of the obligation which, as appears from the aforesaid, could have but one meaning, could, as the Appellate Court does not fail to recognize, be answered only in accordance with [193] German law. The Appellate Court thinks to be able to solve this problem by assuming that the provision concerning the paying terms had a vacuum which had not been recognized by the parties, when the debt was founded, and that this vacuum must be filled up by supplementary interpretation of the will of the parties, according to which supplementary interpretation the contract is construed to mean that not the German currency, as such, but its "metallic base" (i. e. the 20 Mark piece in gold, mentioned in the debentures and coupons), shall be considered to form the basis of the obligation, so that really the debt is not a German Mark debt but a standard currency debt. These considerations cannot be adopted. The upshot of these considerations is that a vacuum in a contract would have to be accepted in any case, when the security, expected by the creditor to cover his claim, should afterwards prove to be unsufficient. This alone is the point at stake. It is not left open how the payment had to be made. Because this was completely settled by the deed. On the contrary, the creditor merely saw himself disappointed

in his confidence placed in the German currency. The consideration of the Appellate Court can neither be approved of from the standpoint of a supplementary interpretation, because they are inconsistent with the contents of the contract, as they have been established by the Appellate Court. This is true especially as regards the alleged fact that the German 20 Mark piece was chosen to serve as exchange standard in event of a payment being made in Austrian Crowns. In the statement of the Appellate Court there is nothing to support the allegations that in this connection the parties had thought of any contract between the gold currency and the paper currency which was then valid, and that this paper currency had been set aside on account of its smaller security. The absolute [194] confidence in the German currency, as such, as it has been established by the Appellate Judge, forthwith excludes such a supposition. It appears also to be of no importance that the French text, which has been annexed only as a simple (uncertified) translation, speaks of "pieces d'or de 20 Marcs."

If thus the possibility has fallen away, following the course adopted by the Appellate Court, to substitute to the agreement of payment in German currency an agreement of a debt in standard currency, then the question must be examined what importance shall be attached to the effect of the depreciation of that currency and of its replacement by a new currency. This question, dealing with the substance of the contractual obligation—the payment —must be judged according to German law. The will of the defendant to subject itself to German

law follows from the fact that the German currency has been chosen and that paying offices within the German Reich have been provided for.

In this connection the subject matter is represented in the first place by the German laws relating to currency. When those legal provisions underwent alterations, the obligation of defendant became subject to the altered provisions, as the defendant as well as the creditor, by agreeing upon payment in German currency has subjected themselves to German law. Consequently, Article 5, par. 3 of the Monetary Law of August 30, 1924, applies, according to which the debtor, insofar as a debt can be paid in Marks of old currency, is entitled to effect the payment in legal tender in such manner that one million millions of Marks is equal to one Reichsmark.

The question of the revaluation of the old debt is something entirely different therefrom. In this connection the question of the applicability of German law must also [195] be answered in the affirmative. The cause of revaluation is the depreciation of the German Mark and this question is part of the question as to what does the obligation consist of.

The amount of a revaluation, if any, cannot be determined in the proceedings in this court. [196]

EXHIBIT "E."

Reports of Decision of the German Supreme Court in the Matter of G. vs. the Dec. vol. O. und N. Bank (Darmstaedter and National Bank) of June 6, 121, p. 203/7.1928, I 25/28.

Reports of the Decisions of the Supreme Court in Civil Cases, vol. 121, p. 203/7, Jur. Woch. (Law Journal) 1928, p. 2024, No. 11.

(Section) 66 Revaluation Act. The German Revaluation Act applies also to Foreigners.

On January 2, 1920, the Swiss Company, G. & Co. in Basle remitted to defendant two million paper marks for the purpose of investment in time-money, for fixed periods of three months each, succeeding each other. It has then transferred the account to the name of plaintiff, to begin from July 1, 1921. Plaintiff, being an Italian national and residing at present in Italy, asserts to have been holder of the account from the very beginning. The amount has not been repaid yet up to now. Plaintiff demands revaluation with the present action. He alleges, as basis of his claim, that (section) 66 of the Revaluation Act is void, because it is repugnant to the Federal Constitution, and furthermore, because in any event it cannot apply as against a foreigner. According to international law, refusal of revaluation is not permissible; since International Law, according to the Federal Constitution, is considered to be part of German law, revaluation must occur. Plaintiff has especially referred to provisions contained in various international treaties, e. g. to Art. 5 of the German-Bulgarian Treaty of Commerce of Aug. 1, 1908, to Art. 3 of the German-Halsan Treaty of Commerce of Oct. 31, 1925, in connection with Art. 1, par. 4 of the German-American Treaty of Commerce of Aug. 17, 1925, and finally to Art. 291 of the Treaty of Versailles. [197]

Rep. 121, p. 203.

The complaint has been dismissed in the lower Courts as well as in this Court.

The Appellate Court has justly held in the First place, that the legal relations in controversy are governed by German law. This has been expressly conceded in the complaint, and also in the brief of appellant for the Court of Appeals it is alleged that the provisions of German law are to be applied to the subject-matter in controversy. As a matter of fact, it has expressly been agreed that German law should govern. Plaintiff himself alleges that the moneys concerned had been invested in Germany already before the war, and had continued to be there. Plaintiff has submitted statements of account, dated Jan. 30 and Aug. 29, 1919, upon which terms and conditions of business are printed to the effect that the firm subjects itself to the jurisdiction of the courts at Mannheim (Germany). He himself, according to the findings of the Appellate Court, has received the terms and conditions of defendant, at all events, on July 29, 1922, and those terms provide in No. 31 expressly for the provisions of German law to govern. It is uncontested, as the Appellate Court has found, that those terms and conditions have been accepted. Consequently, German law has become the law governing the contract. Therefrom results now that the German Revaluation Act of July 16, 1925, is of decisive importance for determining the controversy. There, in Sec. 66 it is provided for: "Claims arising from a loan or from an agreement for safe-keeping (deposit) * * * shall * * * not be revalued, if they are raised against an enterprise the business

of which is devoted to the purchasing and loaning of money." It is evident and has not been contested from any side that all those premises are present in this case. Consequently, a revaluation of the claim of [198] plaintiff has been barred by Rep. 121, p. 203.

law, and it is not necessary, therefore, to examine into the other viewpoints as adduced in the opinion of the Appellate Court. This result conforms to the decisions of the Supreme Court as consistently rendered, according to which the provisions as regards revaluation obtain against and in favor of foreigners likewise as they do for and against Germans, (Dec. of Supr. C. vol. 113, p. 42).

This is objected to by the appellant in review. In the first place, he contends that, according to Art. 4 of the German Federal Constitution, the German laws must be consistent with International Law, that such laws however, demand repayment of debts arising from loans in the gold-value, which the money, when handed over, has had. It cannot be recognized that there is any rule of International law to this or to a similar effect. In regard thereto, reference may be made to the judicial decisions outside of Germany. The English Courts do not recognize such a rule. In the case which has been referred to in Jur. Woch. (Law Journal) of 1926, p. 222 and 1374, an action was brought for payment of a life-insurance policy in the amount of 60,000 mark, which has been written prior to the war and the premiums of which had been paid in German marks of full value. The lower court held that payment, which became due in 1922 or 1923, was,

under English law, on principles, to be made in paper-marks, that, however, due to incidental circumstances, as certain methods of carrying the accounts and of calculating employed by the company, according to the conditions surrounding that individual case payment in gold marks, nevertheless, could be demanded. The Higher Court, however, has held differently and has determined that payment should be made at the rate of exchange of the German [199] mark at the time of payment. Rep. 121, p. 203.

The same principle that a payment agreed to in marks before the new German currency had been introduced, was to be made in paper-marks, has been adhered to in the case of Chasterman Trust vs. Browning (Jur. Woch. 1924, p. 744). Similarly a Danish Court has held that repayment of a mortgage recorded in marks was to be made in paper-marks, although the loan had been made before the war in marks of full value (Jur. Woch. 1926, p. 617). A Norwegian judgment has held likewise, with slight restrictions (ibid. p. 1043). The additional foreign decisions produced by plaintiff do not contain anything to the contrary. In the judgment of the Cour de Cassation (Supreme Court) of Paris, to which plaintiff refers, a case was concerned where a gold-clause (clause du paisment an or, clause of payment in gold) had expressly been agreed to; in the judgment of the North-American Appellate Court a claim for damages by reason of delay of payment was in, question, which claim from the beginning, had arisen in dollars—i. e. all such cases which cannot be compared with the pres-

ent case. From the said reasons it cannot be conceded that Section 66 is repugnant to the accepted rules of International Law.

Also the reference made to the German-Italian Treaty of Commerce of Oct. 31, 1925 (R. G. Bl., Fed. Law Gar. 11, 1621) is of no avail to plaintiff. Art. 3 there prescribes: "The nationals of each * * * Party shall have full liberty * * * to hold property within the territory of the other one and to acquire ownership thereof, and that within such limits as is permitted to the nationals of any other state to hold or acquire property." Concerning the most-favored-nation-clause therein expressed appellant makes reference to the German-American Treaty of Commerce (R. S. Bl., Fed. Law Gar. 11 795), where in Art. 1, par. 4, it is agreed that [200] the nationals of the other Rep. 121, p. 203.

party shall enjoy such protection and security as International Law prescribes; their property shall not be taken without due process of law and without payment of just compensation.—Whether also mere debts are included in the property thus referred to, is immaterial. For the provision contained in Sec. 66 does not import any exercise of the right of eminent domain. Besides, the manner how the legal relations of the parties have developed, must also be pointed out. According to the allegations contained in the complaint, time-money was concerned in the present case which was given for a fixed period of three months each time. Therefore every three months a renewal had to be made. The last account stated "on time money account" filed with

the record carries an acknowledgment dated Aug. 25, 1923. Until such time, consequently, plaintiff had voluntarily deferred demand of payment of the loan. This claim at that time had already a proportionately very small gold-value, though showing a large face amount. During the weeks subsequent thereto the claim then depreciated entirely. It is not at all evident that plaintiff at that or any time at all has demanded repayment of the loan. He has submitted to the ever increasing depreciation. The fact then is that the balance of his account in his favor has become worthless through the increasing drabness of the times; but no property of his has been taken by condemnation. No measure taken by any authorities, by which property of his has been taken away from him within the meaning of the Treaties of Commerce referred to, is evident. The motive inducing him to leave his money with defendant, although it became more worthless from day to day, whether he was perhaps hoping for an appreciation of the mark, is immaterial. He had no claim to revaluation [201] according to the Rep. 121, p. 203.

facts stated. It follows that through Sec. 66, Rev. Act, he has not been deprived of anything to which he already had a claim, the provisions of Sec. 66, rather, had merely the effect that such advantages were not granted to him as were granted by the law in cases of a different nature. Consequently, it cannot be said that Sec. 66 is repugnant to the provisions of the German-Italian Treaty of Commerce in any way; and, since the Rev. Act has already been in effect when the Treaty of Commerce re-

ferred to was concluded, any such consideration is entirely barred. [202]

EXHIBIT "F."

Decree of the V. Civil Senate of the German Supreme Court of January 11, 1922. Decision of the German Supreme Court, Vol. 103.

Page 384.

In the registration book of W. a mortgage loan in the amount of 55000 M. in favor of the defendant has been registered on the property of the plaintiff. In the debt document regarding this entry dated August 16, 1914, the parties have agreed that all payments be made without calculation "in German Gold currency." In the year 1919 a difficulty arose between the parties regarding the question whether, as the defendant states, the mortgage loan on account of delays in the payment of the interest by the plaintiff had become due, and whether, as he furthermore states, the payment would have to take place in an amount equal to the value of the loan in Reichs Gold coin. With regard to both questions, the plaintiff filed a negative determination complaint, but, after his petition, filed in conformity with the mortgage act of June 8, 1916, at the District Court of Solingen—to consider the maturity of the mortgage as non-occurred—has been dismissed, paid the amount loaned on February 5, 1920, in paper money and then requested to ascertain that with this payment the claim of the defendant be considered wiped out and to condemn the defendant at the same time to hand out the

loan document and to consent to the wiping out of the mortgage. However, the defendant then filed a counter-complaint with the request to ascertain that the plaintiff is obligated to pay the debt amount of 55000 Marks together with interest in German Gold currency, i. e. at the rate of exchange of the German money at the time of the maturity. The "Landgericht" (Provincial Court), after taking the evidence, consented to the complaint, dismissed the counter-complaint and condemned the defendant to the payment of the cost of the proceedings, [203] whereupon the latter made another appeal and changed his petition in so far as he requested to condemn the plaintiff to pay the amount of 55000 M. together with interest in German Gold currency at the rate of exchange at the time of payment—February 5, 1920—i. e. after deduction of the 55000 M. paid, i. e. the sum of 1078500 M. together with interest at the rate of 5½% since Feb. 5, 1920. The Supreme Court dismissed the appeal at the expense of the defendant simultaneously charging the plaintiff with an expense of 1000 M. because he wrongfully denied the maturity of the loan at first. Another appeal was unsuccessful.

REASONS:

The judgment of appeal is based upon the thought that the arrangement made between the parties, to make all payments "in German Gold currency," can be interpreted as an arrangement of a gold clause, i. e. in such a way that the plaintiff has to make all payments in Reichs gold coins, but that he is not—as would be the case with a regular gold

clause—obligated to pay an amount equal to the value of the amount owed in Reichs gold coins From this interpretation of the agreement the judge of appeals follows that the plaintiff—since Reichs gold coins were not in circulation any more at the time he made the payment on Feb. 5, 1920—in conformity with Sec. 245BGE was obligated as well as entitled to pay back the amount loaned by making payment in paper money in the nominal sum, and that he is, therefore, freed from his debt by the payment which he so effected.

The appeal attacks the interpretation of this agreement which forms the assumption for this thought as well as the decision therein, however, wrongfully.

In the first place, it states that the interpretation does not conform to the legal interpretation principles and that it infringes Sec. 286 ZPO. by nonobservance of important [204] circumstances, i. e., charging that the interpretation of the judge of appeals would not be in conformity with the wording of the clause because it was not agreed to make payment in German gold coins but in German gold currency. This objection, however, is baseless. Because a German gold currency in such a sense that the currency system was to be understood by currency, it did not exist any longer, since by the law—which became effective on Aug. 4, 1914, the day of its publication—regarding the Reichs treasury notes and bank notes (RGBL.347) as well as formerly the Bank of Issue notes, the Reichs Treasury notes have been declared as legal tender until further notice and since it was further deter-

mined that until further notice the Reichs Pay-Office was not obligated to redeem the Reichs treasury notes nor was the Bank of Issue obligated to redeem their notes. Therefore, the Judge of Appeals cannot be opposed if he interprets the wording of the clause agreed upon between the parties in such a way that payment in German gold coins may be considered as agreed upon. Also by the refusal of the expert evidence produced by the defendant for his adverse opinion of the wording of the clause, the defendant is not inconvenienced. Because, besides the fact that here the existence of a custom was not stated according to the contents of the offer of evidence contained in the final sentence of the statement of facts, the appointment of experts depends, as everyone knows, on the discretion of the court. Therefore, it is not considered a violation of the law of the proceedings if the court, as in the present case, procures for himself sufficient knowledge of the matter in order to form an opinion regarding the question under consideration without the aid of experts.

Not * * * [205]

EXHIBIT "G."

Decision of the Civil Senate of the Bavarian Supreme Court of September 30, 1922, III 76/22. 1)

The purpose of the safety mortgage in the maximum amount of 5000 gold Mark is a liability in the

1) From the "Juristische Wochenscrift" 1923, Page 126/127.

amount of not more than 5000 Mark in gold; the petition for recording, therefore, includes a gold clause. A gold clause already existed before the war as of three different meanings. Either it purports to avoid the payment in silver coins, in case silver money is valid as legal tender besides the gold money in conformity with the respective prevailing coinage law, or it means that payment is to be made in the valid gold coins, if in the place of 10 and 20 M. pieces gold coins in other denominations should be coined; or it may mean that in case of a change of the currency, payment must be effected in the now prevailing Reichs gold coins or in other gold coins in such a way that the creditor will receive just as much fine gold as he would have received had he been paid in 10 or 20 Mark gold pieces. The first two cases may be combined to be called gold coin clause, while the third one might be called a gold value clause. To what extent the gold clause may be registered in the land book and thereby be made a clause effective *in rem,* was already a matter of controversy up to now. It should be decisive—besides Sections 1115, 1190 BCE and Sec. 28 sentence 2 Land Book Act according to which amounts of money to be registered have to be stated in currency of the Empire—whether or not the generally governing legal principle of the necessary certainty within the meaning of the land book act is affected by the inclusion of the gold clause when registration of the money amounts of the mortgage are being [206] made. The order of the mortgage must be firmly determined, considering the rights of a subsequent creditor and in ref-

erence to the possible owner mortgage (Hoeninger JW. 1919, 473). The courts (particularly RG. 50, 145; Bavarian Supreme Court 2, 803; KGJ. 20 A 194; 25 A 155) in an overwhelming majority, held that in the two first mentioned cases the possibility of registration is to be assumed. That the so-called gold value clause, which actually amounts to nothing else but to a clause guaranteeing the rate of exchange, contradicts the principles of the required certainty and that, therefore, this kind of a clause cannot be registered, has been assumed all along. This opinion should also be governing now. (See RG. 101, 141; 103, 387; Geiler JW. 1922, 197.) The petitioner wants his petition—in conformity with the principles laid down in RG. 50, 145—to be understood only in the sense of a gold coin clause in consequence of his standpoint stated in his petition. In the notarial document this intention is not expressed more clearly; the other party has not been heard in reference thereto. It is immaterial, however, whether or not this interpretation is correct. Even if the present gold clause is construed in the sense of a gold coin clause only, it cannot be registered any more. As a matter of fact, the paper currency subsists now in the German Reich. (Nussbaum, the new German Law of Economics, Sec. 5, 12; RG. 103, 386.) The basis for same was formed by the Reichs law of August 4, 1914 (Reichs Gesetzblatt 347), which released the Reichsbank of its duty to redeem its notes in gold. By an amendment to the Banking Law of the same date (RCBl. 327) the Reichsbank was furthermore permitted for the purposes of covering one-third of the bank

notes, which, so far, had to consist of gold, negotiable [207] German money or treasury bills, to use also loan certicates as cover which in default of a compulsory rule to commonly accept them, can be considered as money tokens only. Out of a number of other provisions which clarify the change to the paper currency it may be referred to the order of September 28, 1914 (RGBl. 417) pursuant to which agreements calling for payments, and made prior to July 31, 1914, have been declared to be not binding until further notice. The term "until further notice" has been explained by the German Supreme Court (Vol. 101, 145) as follows: "until a further legislation may determine otherwise." It may furthermore be referred to Article 248 Sec. 2 of the so-called Peace Treaty as evidence, according to which the German Government is not allowed either to export gold or to permit the export or disposition of same. On account of the tremendous prices for gold and the difficulties of procuring same, the average real property owner cannot pay in gold any more. Therefore, one may agree with Reichs to distinguish subjective and objective payments (German Judges' Review 1922, 204), or to arrive at the same result, if one considers Sec. 245 BGB, as does R. G. Vol. 103, p. 384. Therefore, even if the Reichs coinage law is formally not abolished, the paper Mark is at present the currency of the Empire when one considers the legal status actually now prevailing. (Muegel, JW. 1921, 1269.) For that reason claims can be registered in the Land Book only in paper Marks. The gold Mark as such is not only no legal tender any longer,

it is not even recognized as constituting a legal value of account. The registration of the gold Mark as manner of paying a mortgage is therefore not in conformity with the principles of the certainty of the land book. The gold Mark at the present time is subject to a fluctuating rate of exchange basis. Subsequent real property creditors [208] when having registered mortgages in gold Mark, cannot ascertain the transaction from the land book with any certainty, neither can owner mortgages, when arising, be limited with any certainty. To make a gold clause a claim *in rem* in the sense of a gold clause is only feasible by means of a special legal permission (Act of February 13, 1920, concerning foreign currency). If a mortgage creditor wants to obtain the results to be derived from a gold coin clause or a gold value clause, the only possible way is to have a maximum mortgage registered in paper mark in the full amount of the assumed difference in the rate of exchange or to have a sales mortgage registered in the face value of the claim in paper mark, and simultaneously a mortgage in the amount of the difference of the rate of exchange to cover the rate of exchange fluctuations. [209]

EXHIBIT "H."

Decree of the V. Civil Senate of the Reichs Supreme Court of December 18, 1920.

Decisions of the Supreme Court, Volume 101, Page 141.

The defendant has given a loan to the plaintiff and his wife without the option of termination up to

July 1917 and from then on with a six months' option of termination for both parties in the amount of M 460000, for which a first mortgage has been registered on the property of the plaintiff. The loan conditions read as follows: "capital and interest are payable at Zuerich in German Reichs currency and as specifically requested by the creditor, in German Reichs gold coin."

On December 2, 1919, the plaintiff gave notice to the defendant regarding the determination of the mortgage to be effective June 2, 1920, simultaneously requesting in a complaint filed on December 12, 1919 to determine that he is not obligated to pay to the defendant the value of the mortgage in gold, and furthermore demanded to ascertain that he would not have this obligation if at the time of the maturity of the mortgage the Supreme Court enactment of September 28, 1914 regarding the non-obligation of certain payment arrangements is still in force. He represents the standpoint that the agreement entered into between the two parties is not binding in conformity with the Supreme Court enactment as far as the payment in gold is concerned. He furthermore alleges that it is impossible for him to make payment in gold. That, therefore, the defendant would not be entitled to demand payment in gold, but that the latter is obligated to accept the amount of the loan at maturity without any premium in paper Mark, simultaneously considering the debt fully amortized. [210]

The defendant filed a petition for the dismissal of the complaint contemporaneously filing a counter complaint with the request to determine that the

plaintiff is obligated to refund the former for his damages caused by the fact that the repayment of the mortgage in consideration of the stipulation of the Supreme Court enactment of September 29, 1914 cannot take place in gold, the defendant being of the opinion that the gold clause agreed upon between the parties can only be interpreted in such a way that the plaintiff has to pay back an amount of money which, figured at the rate of exchange, would be equal to the amount of the loan in Reichs gold coins. Such an agreement, he claims, cannot be affected by the enactment of September 28, 1914. That the clause might possibly be interpreted in that way according to Sec. 140 or, because of the fact that the contract is not complete, according to Sec. 157 BOB. That the enactment has only a postponing effect. And that there would be no question of an incapability of making payment. Furthermore, that he is willing to accept paper Mark at the value of the rate of exchange. And finally that the plaintiff must represent a possible incapability because he gave notice. The "Landgericht" (Provincial Court) by its decree of January 22, 1920 has determined with regard to the complaint, that the plaintiff can pay to the defendant the amount loaned in paper Mark at the nominal value, if on June 2, 1920 the Supreme Court enactment of September 28, 1914 is still in force; simultaneously dismissing the counter-complaint. In the Lower Court of Appeals the defendant has added to his counter-complaint the petition to determine that he is only then obligated to give a receipt in full for the mortgage, if the plaintiff or his wife pay a sum at Zuerich which

according to the rate of exchange of the German paper [211] Reichs Mark on the day of the payment equals the sum of M 460000, while the plaintiff has requested to dismiss the appeal and furthermore demanded to determine that he is not obligated to effect the payment of the M 460000 in gold. Whereupon the Supreme Court by its decree of June 2, 1920 dismissed the appeal and stated with regard to the complaint that the plaintiff, as long as the Supreme Court enactment of September 28, 1914 is still in force, is not obligated to pay back the amount in gold; however, the Supreme Court dismissed the second petition of the plaintiff asking whether he could pay the loan in paper money in the nominal value. The petition of the plaintiff was granted, while the defendant's appeal was dismissed.

REASONS:

* * * * * * * * * * *

The appeal was successful.

The Judge of the Court of Appeals has dismissed the chief petition filed by the plaintiff in the Court of Appeals because he assumes that in conformity with the Supreme Court enactment of September 28, 1914 he is not obligated to pay back in gold at the present time, but that he is, on the other hand, not entitled to free himself by the payment in paper money at the nominal value, which opinion he explains by the fact that the enactment would admit such an interpretation that as exceptional stipulation same might be considered rather limiting than extending, thus avoiding any damages to the cred-

itor. However, these opinions are not to be considered as decisive. [212]

Of course, in Sec. 1 of the enactment of September 28, 1914 the non-obligation of the agreements entered into before July 31, 1914—in accordance with which payment in gold has to be effected—has been ordered "until further notice" ("until further notice they are not binding"). However, this enactment is not to be interpreted in such a way that the claim of the creditor to the payment in gold remains and that its valorization is only temporarily postponed. If wanted, this could and should have been expressed much clearer. The term "until further notice" is here as well as in other war enactments and laws explained by the fact that it was to be made clear from the beginning that the enactment passed is to be considered a temporary one and that a re-establishment of the former status may be considered, just as soon as conditions will have changed in such a way so as to warrant the abolishment of the enactment. Therefore, as long as such abolishment has not occurred, the gold clause is not binding and the claim of the creditor for the payment to which he would have been entitled in the absence of the gold clause, is limited. It follows, therefore, that the debtor can free himself of his debt at maturity of the claim by making this payment.

An adverse opinion would be contradicting the purpose of the enactment of the Supreme Court. The reason for its issuance formed the law regarding the Treasury Notes and the bank notes of August 4, 1914 (RCBl. Page 347) by which, so as to

prevent any damages to the gold stock which in turn would lessen the official interest, it was determined until further notice that the Reichs Pay Office is not obligated to [213] redeem Treasury Notes nor the Bank of Issue to redeem its own notes. As it reads in the document laid before the Reichstag regarding the economic enactments caused by the war (Printed Matter 1914 11. Session No. 26, Page 7) it appeared "necessary during a time in which the Bank of Issue discontinued the redemption of its notes against gold, while the trade nevertheless recognizes the full valuation of the notes unlimited, to discontinue the force of the gold clause temporarily so as to protect the debtor from tricky execution of the rights of the creditor but without hesitation because it does not involve any disadvantages for the creditor. At the approach of the quarter of the year the Supreme Court, therefore, passed the decree announced by a publication of September 28, 1914, whereby it was simultaneously considered that the maintenance of the gold clause would have infringed the general efforts to compile the gold stock at the Bank of Issue. And it is just this consideration that prohibits the interpretation of the Supreme Court enactment in the manner requested by the defendant. Because according to same, the debtor could not have been indirectly forced to effect payment in gold; however, he would have been subjected to a direct compulsory request to procure the gold and, in order to avoid a legal or economical disadvantage. He would have been forced to amortize the debt. Furthermore, the legal interpretation of the defend-

ant would lead to serious interruption in the mortgage and property business. The making reference to the opposite interest of the creditor, caused by the sinking of the currency, cannot be decisive. That the interpretation of the plaintiff of the enactment corresponds with the sense of the legislation is by the way expressly confirmed in the abovementioned document, [214] where it is pointed out that a payment offered in kinds of money other than gold cannot be refused by the creditor by referring to the gold clause; the creditor would get into "acceptance delay," the interest of the amount refused would discontinue and the debtor could make a deposit for the amount offered in vain. Therefore, on the basis of the Supreme Court enactment of September 28, 1914, the plaintiff was entitled to pay the mortgage of the defendant at maturity in paper money in the nominal amount. Another opinion is out of the question here, because the plaintiff has caused the maturity of the mortgage by his giving notice, to which he was entitled according to the terms of the loan agreement and it is not in violation of the "good faith," particularly so because the plaintiff in consideration of the sale of the property and according to his indisputable explanation has a great interest in the amortization of the mortgage of the defendant. Therefore, with regard to the complaint the judgment of the first judge has to be re-established. [215]

EXHIBIT "I."

Valorization Statues.

Section 59.

(1) Insurance claims within the purview of *par.* 60, 61 are the claims of the insured growing out of life insurance contracts and furthermore the claims of the insured growing out of such sickness, accident and liability insurance contracts for which according to the provisions of the law or according to the prescription of the supervising authority there was to be created prior to Feb. 14, 1924, a premium reserve fund within the purview of par. 56 and following paragraphs of the Insurance Supervision Law with the exception of claims growing out of liability insurance contracts with unlimited cover. By life insurance there is meant the insurance for the case of survivorship, for the case of death, the insurance of a capital, of an annuity, etc.; furthermore, disability, old age, widows' orphans', outfit and military service insurance, whether payable in a lump sum or in an annuity.

(2) The Government of the Reich, or the office determined by it, is empowered to enact regulations on the requirements, the manner and the extent of the valorization of claims of the insured growing out of insurance contracts of other kinds.

Section 60—Paragraph 1 and 2.

(1) Insurance claims are valorized through the turning over of the valorized assets of the insurance concern together with a contribution, if any, to be

made out of the remaining property of the debtor to a trustee.

(2) The trustee is to use the sum (valorization stock) turned over to him subject to deduction of managing expenses for the benefit of the insured according to a plan of distribution approved by the Supervising Authority. The plan of distribution becomes binding upon its being approved by the Supervising Authority.

Section 61.

The Government of the Reich or the office designated by it shall enact further regulations as to the computation of the insurance claims, as to the formation, preservation, liquidation and distribution of the valorization stock as well as to the contribution to be made by the debtor to the valorization stock; it may fix a goldmark sum which the insurance claims are required to reach in order to be considered in the distribution. It may authorize in special cases the carrying out of the valorization proceedings in a manner other than the transfer of the valorization stock to a trustee, and may enact special provisions as to claims growing out of insurance contracts with foreign insurance concerns which are not under Governmental supervision. Furthermore, it may enact such regulations supplementing the provisions of this law as it may deem necessary for the carrying out of the valorization. [216]

Section 62.

The valorization of claims other than those designated in Sections 4 to 61 is subject to the general

provisions of law unless otherwise provided in Sections 63 to 66.

(Sections 63 to 66 do not relate to insurance—except subsection 3, Section 63, which mentions workmen and employe insurance and hence has no application to the case at bar.) [217]

EXHIBIT "J."

DECREE OF NOVEMBER 29, 1925.

Section 95.

There are subject to revaluation, claims of insured parties, (insured, beneficiaries) arising from life insurance contracts and also from sickness, accident and liability insurance contract as to which, according to the provisions of the law or according to the orders of the supervising authority there was to be constituted, prior to Feb. 14, 1924, a premium reserve fund within Par. 56 and following paragraphs of the insurance supervision law. The claims must grow out of legal relationships created prior to Feb. 14, 1924, and must have as their object the payment of a sum certain of money expressed either in marks or in any other domestic currency no longer in force. Claims growing out of liability insurance contracts with limited duration or out of life long liability insurance contracts are not affected by this provision.

Section 96.

(1) The claims contemplated in Par. 95 are valorized to the extent of the available resources, there being taken as basis the reserves (technical

or mathematical reserves, premium deposits, etc.) applying thereto, proper consideration being had of payments and arrears on both sides. The reserves, the arrears and the payments are computed in this connection according to their gold mark value, proper application being made for the purpose of such computation of Par. 2, subsections I of the law.

(2) The supervising authority may enact detailed regulations for the carrying into effect of the foregoing provisions.

Section 97.

(1) The assets of the insurance concern to be transferred to the trustee constitute the valorization stock for the own holdings of the insurance concern (Translator's note: The insurance underwritten directly by the insurance company concerned). It constitutes at the same time the valorization stock for the insurances, transferred to the insurance concern prior to Feb. 14, 1924, coming within the provisions of Art. 95, unless otherwise appearing from the contract of assignment or from the circumstances of the assignment or unless a special adjustment in the case of insurances taken over appears necessary to avoid grossly inequitable results. For the purpose of avoiding such inequitable results, it may also be permitted that a stock of insurance or individual insurances being the subject matter of a transfer or assignment on the part of the insurers are taken care of by means of the assets of the valorization stock of the insurance concern effecting the transfer in such a manner

that these insurances, in connection with the revaluation, do not fare worse than before the transfer. The decision as to whether there is ground for such an exception rests with the supervising authorities. [218]

* * * * * * * * * * *

(3) To the valorization stock accrue, subject to the limitations growing out of the foregoing provisions and subject to the provisions of Article 102, the entire valorized assets of the insurance concern belonging to it at the end of the 13th of February, 1924, inasfar as same are not pledged or constituted as special security under Par. 57, subsection 1, clause 2 of the insurance supervision law.

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Section 100.

Whenever it appears expedient in view of the economic situation of the insurance concern, upon the request of and under regulations to be made by the supervising authority, contributions are to be made into the valorization stock out of the other property of the insurance concern. The contributions are to be levied upon application by the trustee in accordance with the provisions of the state laws on the levy and collection of taxes. In the event of such contributions, the supervision authority may allow the formation of a valorization equalization stock within the meaning of Art. 81 of the law and make provision for the writing down of same through yearly appropriations. It may also allow the contribution to be affected in installments.

Section 101.

1. The trustee is entitled, with the consent of the supervising authority, and is bound, upon directions from the supervising authority, to release a portion of the valorization stock for the satisfaction of other obligations of the insurance concern (administration costs, foreign currency debts, claims under war loan and savings prize (premium) loan insurances, as well as claims under sickness, accident and liability insurance, contracts inasfar as they do not come under Article 95) whenever the use contemplated to be made of the released portion appears necessary to preserve the economic stability of the insurance concern or to avoid grossly inequitable results or whenever it appears advantageous for the insured, in view of the general situation of the insurance concern.

* * * * * * * * * * *

3. Disputes arising between the trustee and the insurance concern as to the valorization stock are decided by the supervising authority to the exclusion of the courts of law in the manner contemplated in Pars. 73, 74 and 84 of the insurance supervision law. The same proceedings are resorted to wherever one of the measures of the supervising authority contemplated in Articles 100, 101, subsection 1 is to be taken or an application to this effect of an interested party is to be rejected or a decision under Article 97, subsection 1, clause 4 is to made. The decisions are to set forth the grounds.

102.

(1) In the event of an insurance company oper-

ating several branches of insurance business, the assets enumerated [219] in Art. 97 are with respect to the insurances made out in marks or in any other domestic currency, no longer in force, distributed upon the request of the trustee and after the insurance concern shall have been heard, among the various branches of insurance in proportion to the gold mark amounts of the technical reserves allotted to such assurances; Article 96, Subsection 1, clause 2 and subsection 2 find corresponding application. In this distribution there is to be allotted to the valorization stocks of the life insurance, of the sickness, accident and liability insurance, an amount not less than the premium reserve fund.

(2) The distribution requires the approval of the supervising authority. Art. 101, subsection 3, finds application. If glaring inequitable results result from a distribution according to Subsection 1, a different manner of distribution is to take place upon the request of the supervising authority.

103.

(1) The trustee is to take over and to administer the valorization stock. The insurance concern is bound to keep in custody the valorization stock upon the request of the trustee. The trustee is authorized to effect out of the valorization stock advances against the claims of the insured and to dispose of such stock inasfar as such disposal appears expedient in the interest of the insured and in particular appears expedient for the prompt effecting of a final or provisional valorization; the

trustee shall before such disposal hear the opinion of the insurance concern, and in the event of objection on the part of the insurance concern, apply for a decision to the supervising authority.

(2) The trustee shall determine the insurance participating in the valorization stock and shall prepare for the utilization of the valorization stock a distribution plan after having heard the insurance concern. The distribution plan shall show the manner of computation of the valorization share devolving on the individual insurance. In case of insurance claims which are not yet due, there shall be computed in the distribution plan by the trustee, to take care of such insurances, subject to the provisions of Article 105, an insurance in Reichsmarks exempt from or subject to contribution. The insurance underwritten by German insurance concerns abroad coming with Art. 95 do not participate in the valorization stock wherever under par. 57, subsection 1, clause 2 of the insurance supervision law, a special security was to be constituted abroad.

(3) In the computation of the new insurance claims the form of the insurance may be altered or modified, in particular the expiration of the insurances may be postponed up to the end of 1932 and a sharing in the profits may be provided for or excluded or regulated anew. In case of repurchase, the entire premium reserve is to be paid to the insured regarding the insurance growing out of the valorization share. [220]

(4) The continuation of the insurance relation-

ships in the form of an insurance subject to contribution is held to have been agreed upon only in the case of the first premium payment to be effected according to the plan of distribution being effected within the time appointed; otherwise the valorization share is to be paid out unless the plan of distribution provides for this case an insurance exempt from contribution.

(5) With the approval of the supervising authority, payments due under the plan of distribution may be wholly or in part postponed until December 31, 1932. This does not apply in case of insurance subject to contribution to such portion of the amount insured as is covered by the payment of premiums.

104.

In the plan of distribution it may be provided that the claims for certain groups of insured or for the insured of all or any years in the case of insurances entered into on or after Jan. 1, 1919, do not come within the general distribution and are to be adjusted separately. In this case there may be offered in particular to the insurer in lieu of the existing insurances, a new insurance subject to contribution with a minimum contribution to be fixed by the supervising authority, proper consideration being had of the valorization share accruing to such insurance. If the insured rejects this offer, he is, at the option of the insurance company, either paid, in cash, at his expense, the valorization share or granted a corresponding insurance exempt from

contribution. The provisions of Art. 103, subsections 3 to 5 find corresponding application.

105.

If the valorization share falls short of a minimum amount contemplated in the distribution plan and approved by the supervising authority or if it is to be expected that the insurance concern will soon be dissolved with consequent extinction of the insurance relationship, it may be directed in the plan of distribution that the insurance relationship be extinguished and the valorization share be paid to the beneficiary. Should the valorization share in the case of insurances for a sum of more than 2,000 marks or for an annuity of more than 100 marks amount to less than 10 Reichsmarks and in the case of other insurance to less than 3 Reichsmarks, then and in such case there may, in lieu of the payment of such valorization share, be formed out of such shares a reserve which the trustee is to use for the benefit of the insured with the approval of the Supervising Authority for the purpose of avoiding excessive hardships. In this connection special consideration is to be had of beneficiaries of advanced age, particularly of beneficiaries of annuity insurances.

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[221]

Section 111.

The Supervising Authority may limit upon the application of the insurance concern or of the trustee the time for the filing of claims to be considered in the drawing up of the distribution plan. The

time so limited is to be made known by publication according to further regulations to be enacted by the Supervising Authority.

Section 114.

Whenever, in connection with the carrying out of the provisions of Section 95 to 113 of this ordinance, it appears expedient in the interest of the insured to adopt in individual cases a different manner of adjustment there may be adopted exceptionally by the Supervising Authority in agreement with the trustee and the insurance concern adjustment within the limits laid down in par. 61 of the law departing from the foregoing provision.

Section 115.

On claims growing out of life insurance contracts made with foreign insurance concerns which are not under the supervision of the Reich, the provisions of Sections 95 to 114 find no application. With respect to these claims one has to abide by the general provisions of the law applying thereto. The final decision as to whether an insurance concern is to be held not to stand under the supervision of the Reich within the meaning of this provision rests with the Federal superintendent's office of private insurance; the procedure contemplated in Section 101, subsection 3, finds corresponding application. [222]

EXHIBIT "K."

In the Name of the Empire.

In the Cases:

In re New York Life Insurance Company, New York, the German Insurance Board.

In His Session of the 25th October, 1928, by Its Judges:

1. Geheimer Regierungsrat BECHER, President,
2. Regierungsrat Dr. KUEHNE,
3. Regierungsrat Dr. WIRTH, permanent member,
4. Geheimer Regierungsrat Dr. SASWER,
5. Dr. SCHMITT, members of the committee,

has pronounced the following judgment:

The New York Life Insurance Company is be regarded, in the meaning of article 115 of the execution decree of the 29th November, 1925—Reichsgesetzblatt 1925, L. S.392—on the Revaluation Act as being a Company subject to the supervision of the German Insurance Board.

Facts and circumstances of the case.

The New York Life Insurance Company is a mutual company with its head office in New York. Before the Private Insurance Companies Supervision Act of the 12th May, 1901—Reichsgesetzblatt 1901, I, 139 came into effect, the company was allowed in the different states of the German Empire to transact business within their territory. After the Private Insurance Companies Supervi-

sion Act had come into force, the Company was subject to the supervision of the German Insurance Board, article 91 section 1 of the Private Insurance Companies Superivision Act. According to articles 86, section 2, Nr. 3, 88, 89 of the law, the company had henceforth an official agency within the German territory and appointed, by a deed executed the 13th August, 1902, Mr. Guido VON EIMPTSCH as authorized agent at Berlin. In The deed, the following passages are contained:

"This power shall remain in force against third parties in the meaning of that act, until the withdrawal has been published in the "Deutsche Reichsanzeiger" by order of the German Insurance Board.

"At the same time the above mentioned company binds itself to entertain an agency in the meaning of the articles 86 and 89 of the above mentioned German Act, as long as these powers will remain in force." [223]

By decree of the *E*mperial Chancellor, dated the 6th August, 1904, the company's amended plans were approved and the company itself allowed to transact business as a life insurance company according to the articles 85, 86 of the Private Insurance Companies Supervision Act, within the whole territory of the German Empire, except Elsase-Lothringer. The admission came into force on the 1st January, 1905, see Reichsanzeiger No. 239 of the 10th October, 1904.

When war had broken out between the United States of America and the German Empire, the au-

thorized agent of the company declared, upon request of the German Insurance Board, that he renounced the further activity of the company and the execution of new contracts. By the contract of the 9th March, 1922, the "New York" transferred all its contracts except some contracts mentioned in article 1 of the contract, to the now established "Kronos Deutsche Lebensversicherungs-Aktiengesellschaft," now called "Mannheimer Lebensversicherungs Bank Aktiengesellschaft" at Berlin. The transfer and the admission of the "Kronos" were approved by a formal judgment of the 5th April, 1922, with some restrictions, and by a decree of the 28th April 1922 without any further restrictions. In the contract between the "New York" and the "Kronos" a provision is contained that the assets transferred by the "New York" to the "Kronos" can be disposed of only with the approval of the German Insurance Board.

In the following time, the "Kronos" has at several occasions obtained the consent of the Board for such alienations.

Already before the contract of the 9th March, 1922, was concluded, the Board informed, by letter of the 29th November, 1921, the "New York" that the intended transfer would not wholly release the company from its obligations against its customers. The Board referred to article 419 of the German Civil Code, to the literature and the decisions of the Reichsgericht, especially to the judgment of the 8th October, 1909, see Civil Cases decided by the Reichsgericht, vol. 72, p. 15; publica-

tions of the German Insurance Board 1909, supplement, p. 84; in this case it was held, that in the case of the transfer of the whole stock the insured was entitled to a security. Afterwards the Reichsgericht held in two judgments, that the "New York" was not released from the obligations against the customers, merely by the contract of transfer, without the approval of the customers themselves, judgment of the 20th November, 1925, Civil cases decided by the Reichsgericht, vol. 112, p. 119; publications of the German Insurance Board 1926, p. 10; judgment of the 4th October, 1927, publications of the German Insurance Board, 1928, p. 3.

By a letter dated the 6th May, 1924, the authorized agent forwarded to the Board a deed, executed the 17th April, 1924, by Mr. Walter BUCKNER, Vice-President, and Mr. Seymour M. BALLARD, Secretary of the company, withdrawing all powers to act for the company which had been granted to the authorized agent. The agent informed the Board, that by this deed his function as authorized agent of the New York Life Insurance Company, in the meaning of article 89 of the Private Insurance Companies Supervision Act, had expired; the entry of the New York in the commercial register was cancelled on the 24th March, 1924, No. 27 326/237. The German Insurance Board protested by its letter of the 23rd May, 1924, against the withdrawal of the powers and the cancellation of the agency in the register, reference being made to the passage contained in the deed of the 13th August, 1922, quoted above, stating:

"We are not in a position to publish the withdrawal of [224] these powers in the "Reichsanzeiger" until a new authorized agent has been appointed for you; though the "New York" does no more conclude new contracts of insurance, the question whether the "New York" is and remains, in spite of the transfer of the German contracts to the "Kronos," bound by the existing contracts, has not yet been decided and settled. Already before the transfer, and afterwards we have mentioned on several occasions, that according to the opinion established in law, the "New York" is not quite released from those contracts for which the transfer has not been expressly approved. The owners of such contracts would in our opinion be in a position to claim performance of the contracts for the "New York" if their claims should not be performed by the "Kronos," see KOENIGE, Kommentar zum Versicherungsaufsichtsgesetz, Sec. 14."

The Board mentioned in this letter also a claim to be decided, at that time, by the Kammergericht and informed the "New York" that further suits must be expected. By his letter of the 25th February, 1925, the authorized agent informed the Board, that he was authorized by a cable of the 25th February, 1925, to hand over to the Board new powers, dated the 19th May, 1922, in exchange of the old powers of 1902 which had been withdrawn, and that he was further authorized to withdraw the withdrawal of the 17th April, 1924. The Board ac-

knowledged receipt of the cancellation of the withdrawal by its letter of the 12th March, 1925. Mr. Guido VON EIMPTSCH deceased the 12th March, 1926. According to the publication of the 23rd August, 1926, Professor George BOHLMANN was appointed authorized agent in his place, and after he had deceased, Mr. Julius KAHN, Frankfurt on Main, according to the publication of the 19th May, 1928.

But the Board did not restrict itself to protest against the withdrawal of the powers of Mr. VON EIMPTSCH and to acknowledge receipt of and publish the other powers, but it exercised an actual supervision on the "New York." First, it accepted numerous complaints of the insured and pronounced official decrees. By these decrees, the insured were fully informed on the facts and legal questions. The Board informed them, that they are, in the opinion of the Board, in a position to claim performance of their contracts from the "New York" provided they had not approved the transfer of their contracts to the "Kronos." The "New York" which was subject to the supervision of the Board, was bound to invest the premium reserves accumulated for the German contracts in German Securities, calling for Mark and sufficiently safe for the investment of trust-money. Having regard to those legal obligations, the company has suffered from the depreciation of the German currency as much as the German companies do. The Board mentioned besides, that it was doubtful whether a contribution out of the free assets of the company could be collected, and to what extent.

As soon as according to article 60 of the Revaluation Act and 110 of the Execution Decree of the Revaluation Act of the 19th November, 1925, a trustee was to be appointed, Regierungerat a. D. Dr. HAGER was appointed trustee on the 9th February, 1926, and, after he had deceased, Direktor a. D. Dr. OSTER, Hamburg, was appointed trustee for the German policies of the "New York."

The securities which date from the former business of the "New York," were transferred to the "Kronos," and now are subject to the administration of a trustee, amount to about [225] 1.6 Millions of Reichsmark. Besides, the "New York" owns the premises at Berlin, Wilhelmstrasse 80a/ Leipaiger Strasse 124, the value of which is estimated at 1½ to 2 Millions Reichsmark. These premises formed at first a security for five policies in foreign currency which were not transferred to the "Kronos." The authorized agent of the "New York" declared, the 31st December, 1923, on behalf of the company, that those premises would not be alienated or mortgaged without the approval of the Board as long as there would exist any obligation to entertain premium reserves for those contracts for which the premises were booked in the premium reserve register, unless every one of those still existing policies were secured by other securities with the approval of the Board. The German Insurance Board attempted to secure these premises for all parties insured in Germany. By its letter of the 19th May, 1927, it asked the agent of the company, to replace the declaration of the 31st December, 1923, by a new declaration so that not only the

single customer with a policy in foreign currency, but also those customers should be protected against an alienation or mortgaging of the premises Leipziger Strasse 124, who could, in spite of the transfer to the "Kronos," claim, according to the cases decided by the Reichegericht, performance from the "New York." By his letter of the 6th September, 1927, the agent refused to give such a declaration, but declared he was authorized by the New York Life Insurance Company to inform the Board that the company denied itself at present any intention of alienating or mortgaging the premises, having regard to the point of view of the Board. Already in 1926, the Board discussed with the company the payment of contribution out of the free assets of the company, according to article 100 of the Execution Decree of the 29th November, 1926, of the Revaluation Act. The discussions, which were continued until now, have made clear that the "New York" is, on principle, prepared, to provide a contribution.

By the decree of the 8th March, 1928, the 30th Civil Section of the 1st District Court of Berlin, in the case Brauer v. New York, asked from the German Insurance Board an official statement, whether the defendant foreign company is to be regarded, in the meaning of article 115 of the Execution Decree of the Revaluation Law, as being subject to the official supervision, and asked further the Board, to pronounce as soon as possible an official decision according to article 115 section 3 of the Execution Decree. Similar motions were brought

the Execution Decree of the Revaluation Act; in the case of Nagel v. New York, the 1st District Court of Berlin has rejected a petition of the plaintiff, since the defendant is a company subject to the official supervision and the revaluation claims can be prosecuted only according to the special provision of the Revaluation Act. [227]

REASONS.

The Court was unable to accept the conclusions of the Agent of the Reichsgemeinschaft amerikanischer Versicherter. According to the opinion of the Court, the official supervision on a foreign insurance company does not expire before the powers granted to the authorized agent are withdrawn and the withdrawal is published in the Reichsanzeiger. No withdrawal of the powers of the company's agent has been published in the Reichsanzeiger. On the contrary, as the "New York" attempted, in 1924, to withdraw the powers granted to its authorized agent, the Board protected against the withdrawal with the result that the withdrawal was cancelled. But the withdrawal of the powers and its publication by the Board has not only a merely formal importance. The authorized agent of a foreign insurance company is legally entitled and authorized to receive every summons on behalf of the company, article 86 section 2 Nr. 3 of the Private Insurance Companies Supervision Act. Until the withdrawal of the powers is not published in the Reichanzeiger, the insured parties are in a position to serve their

suits on the agent, to have the case decided by German courts and to enforce them against the German assets of the company. Even the agent of the Reichsgemeinschaft amerikanischer Versicherter has served his suits versus the "New York" on the authorized agent of the company.

If the opinion of the agent of the Reichsgemeinschaft amerikanischer Versicherter were true, the "New York" would be subject to the supervision of the Board not with regard to those contracts which have been transferred to "Kronos," but only with regard to those contracts which were exempted from the transfer by the contract of transfer itself. The Court thought it impossible, both for legal and other reasons, to make a distinction of that kind. The supervision of the German Insurance Board on a foreign insurance company must be undivided. According to the provisions of the Private Insurance Companies Supervision Act, the Board is entitled to protect the interest of every insured person who can make claims against the company arising out of contracts concluded with the "New York." For the above mentioned reason the Board informed the "New York" already before the conclusion of the contract between the "New York" and the "Kronos" that the "New York" would not be wholly released by this contract of transfer from the claims of those insured persons who did not give their consent to the transfer. The Board was bound to fulfill its obligations resulting from the Supervision Act especially since the cases decided by the

Reichegericht on the 20th November, 1925, had cleared up that there still existed direct claims against the "New York." If the opinion of the agent of the Reichsgemeinschaft were correct, the insured parties would be deprived of the protection afforded by the Board in the very moment in which the protection is urgently wanted. It is only a consequence of the opinion of the Court, that the Court, according to the provisions of the Revaluation Act and its Execution Decree, appointed a trustee for the German policies of the "New York" and discussed with the company the question of a contribution out of the free assets of the company according to article 100 of the Execution Decree of the Revaluation Act.

The reference made by the agent of the Reishsgemeinschaft to the circumstances—which are in his opinion similar to the present case—of the amalgamation of two German Insurance companies is, in the opinion of the Court, wrong. The [228] consequence of an amalgamation is the liquidation of the hitherto existing companies. The legal existence of the "New York" has not been touched by the conclusion of the Contract of transfer with the "Kronos." The company does still exist; only in the German Republic it does no more conclude new contracts of insurance and restricts itself to liquidate the existing contracts. The supervision of the Board must be extended also over the liquidation of the existing policies, according to the express provisions of the article 66 of the Supervision Act, which applies, accord-

ing to article 65 section 2 of the Supervision Act, also to foreign insurance companies.

The Court can neither accept the objection that a decree to be pronounced according to article 100 and 101 section 3 of the Execution Decree cannot be executed or enforced abroad, and that for this reason the supervision of the "New York" must be denied. First, the German assets of the company must be taken into consideration securing the performance of the revaluation claims existing against the "New York" and liable to be seized; the assets consist in the securities dating from the former business of the "New York" which amount to 1.8 Millions Reichsmark, and the real estate of the "New York" amounting to 1½ to 2 Millions Reichsmark. Having regard to the present situation there seems to be no reason to maintain the distrust that a decree pronounced according to article 101 section 3 of the Execution Decree of the Revaluation Act concerning the additional contribution must be executed and enforced abroad. As will be seen from their former declaration, amongst others from the one of the 5th September, 1927, regarding its real estate, the company is prepared to meet the interest of its customers. Especially in the negotiations maintained up to now, the company was on principle prepared to provide a contribution out of its remaining assets. Though an understanding regarding the amount of the contribution has not yet been realized, the Court is convinced, regarding the reputation which the company enjoys all the world over and regarding

the readiness which the company always showed in fulfilling the regulations of the Board, the company will pay a contribution that has been established in a legal procedure by this Court or by the Appeal Division of the German Insurance Board. From the mere possibility that the "New York" would not submit in future stage to a decree pronounced according to articles 100 and 101 section 3 of the Execution Decree, the Court would not draw the conclusion that the "New York" must be regarded as a company not being subject to the official supervision in the meaning of the article 115 of the Execution Decree. The Court shrunk back from drawing such a conclusion inasmuch as the valuable real estate Leipziger Strasse 124 are available in Germany for the general performance of the claims of German creditors.

For these reasons the Court held as above stated.

THE GERMAN INSURANCE BOARD.

Seal Signed: BECKER.

Tgb. Nr. 11 16/278. [229]

EXHIBIT "L."

In the Name of the Empire.

In re the trustee of the New York Life Insurance Company The German Insurance Board, in the public session of February 13, 1929, by its judges:

1. KISSEL, president of the German Insurance Board, as President,
2. NUSS, Ambassador of Hessen and member of the Reichsrat,

3. Regierungsrat Dr. GORMANN, as member,
4. Preussischer Obererwaltungericharat Dr. WEYMANN,
5. Senatsprasident des Kammergerichts, Dr. KAMPS, as learned assessors,
6. KIMMIG, Manager of the Karlsruher Lebensvesicherungsbank Aktiengesellschaft,
7. Sachsischer Hofrat Dr. WALTHER, as members of the committee,

after a secret conference has pronounced the following judgment:

> "The appeal formed by the Trustee of the New York Life Insurance Company against the judgment of the Court below rendered the 25th October, 1928, in accordance with article 115 of the execution decree of the 29th November, 1925, of the revaluation Act, is dismissed."

(Stamp: Akudo-Akademisches Ubersetzungsund Dolmetscherburo Frankfurt a. Main. Mertonstrhasse 17, Fernsprecher Maingau 1493.)

Facts and circumstances of the case.

The New York Life Insurance Company—below simply called "New York"—a mutual company with its head office at New York, U. S. A., transacted business as a life insurance company in several German states even before the Private Insurance Companies Supervision Act of the 12th May, 1901—[230] Reichsgesetzblatt, p. 139—below called: Picsa—was published. After this act had come into effect, the New York soon appointed an authorized agent for the German Empire, Mr. Guido von NIMPTSCH, and engaged to maintain

an agency in the meaning of Sec. 86 al. 2 nr. 3 and Sec. 89 of the PICSA, at the domicile of the authorized agent. By the decree of the Reichskanzler, dated the 6th August, 1904, the Company was allowed to transact, from the 1st January, 1905, business as a Life Insurance Company within the German Empire, except Elsass-Lothringen.

After the beginning of the last war, the New York soon diminished the execution of new contracts; after the United States had entered the war against Germany, the authorized agent, on request of the German Insurance Board, gave the formal declaration that he would renounce any further activity and the execution of new insurance contracts within Germany.

The 15th November, 1921, the authorized agent asked the German Insurance Board what legal and other conditions must be fulfilled in order to transfer the German contracts of the "New York" to another German company which should be founded. By the letter of the 29th November, 1921, he obtained full legal information, by which it was pointed out, i. e., with reference to the literature and the decisions of the Reichsgericht—comp. Sec. 419 of the German Civil Code and the judgment of the Reichsgericht of the 8th October, 1909, Civil Cases decided by the Reichsgericht, 72nd, volume, p. 15, Reports of the German Insurance Board, 1909, supplement, p. 84—that by such transfer, even if it would have been approved by the German Insurance Board, the "New York" would not be released from its obligations against such insured

which would not assent to the transfer. [231] Afterwards the German life insurance contracts, by a contract dated the 9th March, 1922, were transferred to the "Kronos" Deutsche Lebensversicherungs-Aktien-Gesellschaft at Berlin—now: Mannheimer Lebensversicherungs-Bank A. G. at Berlin—below called: Kronos a new established company. According to art. 1 of the contract of 9th March, 1922, the transfer did not include:

1. all contracts not calling for German Marks;
2. all contracts of foreigners, including those which had become citizens of other nations, as Poland, France, Denmark, &c., owing to cessions of territory; except those where the insured gave their written consent;
3. all contracts of German citizens now residing outside of the German Empire and paying their premiums outside of Germany.

By the decree of a Senate of the Board, dated the 5th April, 1922, the Kronos was allowed to transact life insurance business, and at the same time, the transfer of the German contracts of the "New York" to the "Kronos" was approved. Two conditions laid down in this decree were declared to have been carried out by decree of the Board, dated the 28th April, 1922.

On the 6th May, 1924, the authorized agent of the "New York" informed the German Insurance Board, that the company had withdrawn his powers to represent the company; at the same time, the authorized agent produced a deed to that effect. The Board was moreover informed, that the agency,

which had been maintained in Germany according to Sec. 86 al. 2 Nr. 3 PICSA, had been cancelled in the Commercial Register on the 24th March, 1924. By its letter of the 23d May, 1924, the German Insurance Board protested against these proceedings of the authorized agent. Owing to this [232] protest, the withdrawn powers of the 13th August, 1902, were replaced by another instrument, submitted by the letter of the 25th February, 1925, appointing again Mr. Guido von NIMPTSCH. After he had deceased, Professor George BOHLMANN at Berlin, and after this gentleman had deceased too, Mr. Julius Kahn at Frankfort on the Main, was appointed authorized agent with the former powers. In the interest of the insured of the New York, according to Sec. 60 of the Revaluation Act and art. 110 of the execution decree of the 28th November, 1925—below called execution decree—first Regerungsrat a. D. Dr. HAGER, who was at the same time trustee of the "Kronos," at Berlin-Schoneberg, and, after he had deceased, to avoid any conflicts of interests, Direktor a. D. Dr. OSTER at Hamburg was appointed as special trustee of the "New York" and another trustee for the "Kronos." Besides the appointment of trustees, the Board has exercised its supervision on many other occasions. Several times, it discussed with the company, the German assets of which include, apart from the securities transferred to the "Kronos" and amounting to about 1.8 Millions of Reichsmark, premises at Berlin, Leipziger Strasse 124 and Wilhelmstrasse 80a, the question of a contri-

bution out of its free assets according to art. 100 of the execution decree; it was informed, that the company is by principle willing to make such contribution. The board besides dealt with a great many of complaints of the insured.

In a law-suit, Brauer v. New York, the 30th Civil Section of the 1st District Court of Berlin, by its decree of the 8th March, 1928, asked from the German Insurance Board a judicial statement, according to art. 115 Sec. 3 of the execution decree. In pursuance thereof, a Senate of the Board, rendered, on the 25th October, 1928, the following judgment: [233]

> "The New York Life Insurance Company is to be regarded in the meaning of art. 115 of the execution decree of the 29th November, 1925, of the Revaluation Act /Reichsgesetzblatt 1925, I, p. 392/as a company subject to the Official Supervision."

Reference is made to the facts and reasons quoted in the above judgment, and its supplement. This judgment was notified to Mr. Julius KAHN, at Frankfurt on the Main, as authorized agent of the "New York," and to Dr. OSTER, at Hamburg, as trustee, the 16th November, 1928. By its letter of the 24th November, received by the Board the 26th November, 1928, the Trustee formed appeal against this judgment, stating that a great many of the insured were of the opinion that this judgment contradicted their interest, and that they had asked him to form appeal in order to obtain a thorough

revision of this judgment by a higher court; he further informed the Board that part of them would hold him responsible for any damages in case he would not form appeal.

In the public session the trustee first gave the same reason for his appeal as he had done in his letter. Afterwards, Mr. KUEHN, attorney of Berlin, with Dr. CRIMM, attorney at Hamburg—both admitted by the Senate with the approval of both parties, though they are not legally concerned in the meaning of Sec. 74 PICSA and art. 113 of the execution decree—pointed out, both in the name of the "Reichsgemeinschaft Amerikanischer Versicherter e. V. and of the insured represented individually by the two attorneys, with reference to the opinion of Staatssekretar a. D. Dr. MUEGEL at Berlin, and Professor Dr. MANES at Berlin, that the notion of the term "Reichsaufsicht" in the Art. 115 of the execution decree was not indentical with the supervision of the PICSA. This difference is made clear by the words [234] "in the meaning of this section" in the art. 115 Sec. 3 of the execution decree. Therefore, the decision could not only depend upon the mere fact of the supervision and its legal foundation. The decisive fact should be, whether official orders as they are involved by the revaluation, can be enforced at any time and to their whole extent, mainly whether a contribution fixed according to art. 100 of the execution decree by the Board could be collected out of the free assets. Even if there should exist a real and legally founded supervision on the meaning of the PICSA,

the judgment to be pronounced according to art. 115 Sec. 3 of the execution decree, could establish that the same company is to be regarded, in the meaning of art. 115 of the execution decree, as not being subject to the official supervision. This should be the judgment in the case of the "New York." Even if there would still exist a real and legally founded supervision of this company in the meaning of the PICSA, this supervision were a mere remainder of a supervision, quite insufficient for the purposes of revaluation, it were not strong enough the contribution out of the free assets, mainly in the amount required by the circumstances of the case, could not be enforced. Reference is being made to the written opinion of Staatssekretar a. D. MUEGEL and Dr. von WERNER, attorney, representing the "New York" first denied that the trustee was entitled to form appeal since he was not prejudiced by the decision of the court below, as will be seen from his arguments. He then contradicted the statements of Dr. KUEHN and Dr. GRIMM. He made clear that the art. 115 of the execution decree had been published by virtue of the legal authorization contained in Sec. 61 al. 2 of the Revaluation Act. This provision was no doubt connected with the meaning of the term "Supervision" as it is used in the PICSA. This meaning ought therefore [235] to guide the interpretation of art. 115 of the execution decree of the Revaluation Act. Any interpretation other than the one quoted above would contradict the legal authorization and result in considering the art. 115

of the execution decree as being void. Moreover, the "New York" since the publication of the PICSA always continued to be subject to the supervision. As the court below expressly stated, the company always fulfilled every order of the German Insurance Board. He did not hesitate to acknowledge the supervision of the German Insurance Board with regard to the "New York" and to announce for the future, that the company would always loyally perform any orders of the German Insurance Board.

REASONS.

The trustee of the "New York," who is legally concerned according to art. 113 of the execution decree, has formed the appeal in due time. There could be the question whether the trustee himself was prejudiced by the decision of the court below. If a free appreciation of the circumstances as it is required by the executive procedure, is applied, it must be taken into account, that the decision might have an indirect, but financially important effect on the interests of the insured, so that the trustee must be regarded as being entitled to form appeal.

The subject-matter of the case itself requires the following arguments:

The transfer of the German contracts of the "New York" to the "Kronos," approved the 5th and 28th April, 1922, did include only those policies which called for German Marks. Several groups of policies were expressly exempted [236] from the transfer. Even those policies which were exempted from the transfer were executed under the German Insurance

Laws (Insurance Contracts Act of 30th May, 1908, Reichsgesetzblatt, p. 263) for which the securities maintained in this Act had to be maintained. Before and after the transfer the competence of the German courts had to be acknowledged, as well as the competence of the German Insurance Board to deal with any complaints.

Apart from the several groups expressly exempted from the transfer, for which there is no doubt that the supervision continued, the right and duty of a supervision by the German Insurance Board continued for those contracts, the insured of which had not given the express consent to the transfer, according to Sec. 66 PICSA and Sec. 85 al. 2 PICSA.

This legally founded supervision was always exercised by the Board. This is made clear by the fact, that the German Insurance Board successfully opposed the withdrawal of the powers granted to the authorized agent, that several trustees have been appointed for the Revaluation, that the question of a contribution out of the free assets according to art. 100 of the execution decree was discussed with the company and that complaints of some insured were dealt with. It is neither possible to distinguish the different acts of supervision according to their importance nor to draw from the fact, that the number of such acts has diminished since the transfer of the German policies, the conclusion that there was no more a full supervision on the "New York." The PICSA leaves it to the discretion of the Board to exercise the supervision in every case according to the circumstances and

within the limits of the law. The supervision consists in the possibility of acts of supervision and this possibility always existed in the case of the "New York." The "New York" so far fulfilled all orders [237] of the Board and acknowledged the right of supervision of the Board, partly expressed, partly by conclusive facts, e. g. on the occasion of the renewal of the withdrawn powers of the authorized agent, and by the conferences regarding the contribution out of the free assets.

Having regard to these facts and state of law, the Senate thought it not necessary to decide whether the meaning of the term "Official Supervision" "in the meaning of this provision" in art. 115 of the execution decree is different from the one of the term "Official Supervision" in the PICSA. Even if the opinion were followed, that art. 115 of the execution decree would allow to distinguish between an official supervision in the meaning of the PICSA and an official supervision in the meaning of the Revaluation Laws, it would be necessary to hold having regard to the fact that the Board always exercised, and still exercises its supervision on the "New York" also in the meaning of the revaluation laws, that the company is subject to the official supervision. The mere fear that the company would disobey the further orders of the German Insurance Board, especially the payment of a reasonable contribution out of the free assets of the company cannot justify, having regard to the present conduct of the company, another opinion.

The question, what will be the legal effect and

legal consequences for Nylic if Nylic should eventually later on withdraw from the payment of a contribution from its other property as getting lawfully fixed in accordance with Art. 100 of the Enforcement Ordinance and should thereby, by fault of its own, place itself outside of the law, could as yet remain undiscussed.

The court therefore held as above.

Sealed and signed,

[Seal] THE GERMAN INSURANCE BOARD.

Signed: KISSEL. [238]

EXHIBIT "M."

Copy.

VII. 43/1928.

In the Name of the Reich,

Published on the 8th June, 1928.

Sgd. Merck,

Government Clerk, Engrosser.

In the Case of

Mrs. Else Schroter of Stafa (Gehren), Switzerland,

Plaintiff and Appellant.

Counsel: Justizrat Dr. Kaiser, Attorney-at-Law, of Leipzig,

versus

The Alte Gothaer Lebensversicherungsbank a. G. in Liquidation at Gotha, represented by its Liquidators,

Defendant and Appellee,

Counsel: Justizrat Dr. Supfle, Attorney-at-law, of Leipzig,

The Supreme Court of the Reich, VIIth Senate for civil cases, upon the hearing of the 8th June, 1928, acting by the President Dr. Strecker and the Councillors Schliewen, Stoltel, Freiherr von Richtofen, Dr. Warneyer, have decided as follows:

The revision against the judgment of the 1st Senate for civil cases of the Court of Appeal (Oberlandesgericht) of Jena of 14th December, 1927, is rejected.

The costs of the appeal are charged to the Appellant.

STATEMENT OF FACTS.

The hunband of the plaintiff had insured his life with the Gothaer Lebensversicherungsbank a. G. After his death, on 27th January, 1918, the Zurich agent of the insurance bank by letter of 31st January, 1918, pointed out to the [239] plaintiff, who, as heiress, had to claim the insured sum of 8000 Marks, that the bank since the war and in commection with the sinking of the Mark agreed to keep insurance sums fallen due, paying on them 4 per cent interest, provided these sums were to be left with the bank for at least one year. Thereupon the plaintiff on the 12th February, 1918, asked the bank to invest with the bank in her favor the 6000 Marks, payable under the policy, at 4 per cent interest. The bank did so and gave a corresponding certificate to the plaintiff dated 26th February, 1918. The plaintiff contends that hereby the insurance claim was converted into a loan. She claims revaluation amounting to 25 per cent, and asks that

the Court decide that, after the prohibition to pay, made by the Supervisory Board on July 7, 1924, is levied, the Gothaer Lebensversicherungsbank shall pay to her 2000 Marks plus 4 per cent interest. The defendant contested the admissibility of legal proceedings, alleging that the insurance claim has not been converted into a loan, but that merely a respite had been granted for its payment. The Court of first instance had granted the claim for an amount of 1600 Marks, and had dismissed it as for the rest. The Court of Appeal had dismissed the whole claim, after the plaintiff, upon the levy of the prohibition to pay, had claimed payment.

With her revision the plaintiff, in the first place, moves for the appeal of the defendant being declared inadmissible and the impeached judgment being reversed;

In the second place, the plaintiff applies for the motion made by her to the Court of Appeal being complied with.

The defendant moves for the revision being rejected. [240]

ARGUMENTS.

The Judge of the Court of Appeal, who has held that the claim falls under German law, considers the appeal admissible. The plaintiff in this connection had raised the following objections: that the action is directed against the Gothaer Lebensversicherungsbank a. G.; that the plaint has been served on this company on the 22d September, 1926. That, according to an entry in the register of said company dated 26th January, 1927, the firm name

has been changed into "Alte Gothaer Lebensversicherungsbank a. G. in Liquidation." That, simultaneously with the "Gothaer Lebensversicherungsbank a. G.," since 27th December, 1922, there has existed the "Neue Gothaer Lebensversicherungsbank a. G."; that the firm name of that company had, on the 26th January, 1927, been changed into "Gothaer Lebensversicherungsbank a. G." That, although the defendant, the former "Gothaer Lebensversicherungsbank a. G." since 26th January, 1927, had adopted the firm name "Alte Gothaer Lebensversicherungsbank a. G. in Liquidation," the judgment of the Court of first instance, dated 12th May, 1927, designates as defendant the "Gothaer Lebensversicherungsbank a. G.," that is to say the company which, until 26th January, 1927, was run under the firm name of "Neue Gothaer Lebensversicherungsbank a. G." That in the appeal, dated 3d June, 1927, the defendant in whose name the appeal was made, was designated as "Gothaer Lebensversicherungsbank a. G." That, at that time, this (Gothaer Lebensversicherungsbank a. G.) was the new company and not the party which had been sued against which the judgment of the first instance had been obtained. That thus the appeal had been brought in by a person which was not a party to the litigation. That, accordingly, the appeal was inadmissible.

The Judge of the Court of Appeal, on his side, [241] exposed; that the defendant is the same firm which in the plaint has correctly been designated as "Gothaer Lebensversicherungsbank a. G." That,

when the judgment was delivered, this designation was incorrect, as, since 26th January, 1927, the defendant carried the name "Alte Gothaer Lebensversicherungsbank a. G. in Liquidation," whilst the firm "Gothaer Lebensversicherungsbank a. G.," since that day, had applied to the firm until then known as the "Neue Gothaer Lebensversicherungsbank a. G." That the indication of the defendant, which thus had become incorrect, might have been corrected without further ado by the Court of first instance, as had been done by the Judge of the Court of Appeal in the heading of the appeal judgment. That the appeal had been brought in by the party which had been sued and condemned, and not by any third person.

The Judge of Appeal considers the appeal as founded. He states that the claim of the plaintiff has not lost its character of insurance claim through the plaintiff having left the insurance sum with the defendant against payment of interest thereon. That thereby neither the insurance claim has been converted into a loan, nor an irregular insurance contract has been concluded. That a conversion into a loan would exist merely, if the parties agreed upon that claim was to be placed on quite a new base, without falling back upon the original claim. That this was not the case in specie. That just the contrary results from the letters of the parties.

That, if there is an insurance claim ordinary proceedings are excluded by Article 107 of the Ordinance of 29th November, 1925. That the plaintiff

could assert her claim in ordinary proceedings only upon this claim being excluded from participation in the distribution proceedings by the Supervisory Board. That this was not the case in the [242] specific case, as the defendant was willing to let the plaintiff participate in the distribution of the revaluation "fund."

The revision is admissible, although the sum involved is only 1600 marks, because the points in dispute are the inadmissibility of the appeal and the inadmissibility of legal proceedings.

It (the revision), is, however, not founded.

The Judge of the Court of Appeal is right in assuming that it is an amendable mistake if in the judgment of the Court of first instance the defendant is designated as "Gothaer Lebensversicherungsbank a. G.," although its firm name, since 26th January 1927, was "Alte Gothaer Lebensversicherungsbank a. G. in Liquidation," and the first name "Gothaer Lebensversicherungsbank a. G.," since that date applied to the former "Neue Gothaer Lebensversicherungsbank a. G." The firm which at the time when the claim was served, was correctly designated as "Gothaer Lebensversicherungsbank a. G.," remained the defendant, although, whilst the action was pending before the Court of first instance, it had changed its firm name, and although the Court of first instance had omitted to amend this indication in the judgment. The view of the Judge of the Court of Appeal that the appeal has been lodged by the true defendant, must also be adopted by the Supreme Court. It is true that, in the appeal as well as in the judgment,

the defendant has erroneously been designated as "Gothaer Lebensversicherungsbank a. G."; but—this obviously is the meaning of the explanations of the Judge of the Court of Appeal—the context leaves no doubt that the defendant for whom the appeal was lodged, was the same body against which the claim had been lodged, which was concerned in the proceedings and against [243] which the judgment was delivered, notwithstanding the fact that, since 26th January, 1927, the firm name "Gothaer Lebensversicherungsbank a. G." applied to another company. The circumstances also that the defendant in its writ of 22nd June, 1927, had, by way of precaution,—although erroneously—relied on the restriction of the liability, provided for in Article 419 alinea 2 of the German Civil Code, does not show that the appeal was lodged by another person than that which had been sued and condemned. In its writ of 12th November, 1927, it (the defendant) had expressly taken the view that the company sued was the old Gothaer Lebensversicherungsbank and that the designation of the defendant in the judgment of the Court of first instance was incorrect. The appeal thus was admissible.

The judgment appealed against does not show any misconception of the principles of law in so far as it rejects the claim because of the inadmissibility of ordinary proceedings. Under Article 56 et seq. of the German Revaluation Act, in connection with Article 107 of the Enforcement Ordinances of 29th November, 1925, the revaluation of claims based on life insurance policies takes place in a special procedure, to the exclusion of ordinary proceedings

in courts. As the Judge of the Court of Appeal correctly assumes, the insurance claim of the plaintiff has not lost its character as such, because the plaintiff, after the insurance sum had become due and payable, let this sum stand with the defendant against payment of interest thereon. The agreement of the parties would have deprived the claim of its original character, only if the parties had intended to quite abolish the old relations and to replace them by new ones, in the manner of the Roman novation. All this is denied by the Judge of the Court of Appeal upon material [244] considerations which do not show any misconception of the principles of law. The principles, laid down by the Supreme Court with regard to the application of Article 63 alinea 2 and 3 of the Revaluation Act (of.: Digest of Decisions of the Supreme Court, volume 113, page 201; Judgment of 8th May, 1926, published in "Aufwertungskartothek," Article 63, Nr. 16; Migel, Das gesamte Aufwertungsrecht, 5th edition, page 921), must apply also to claims of the insured arising out of life insurance policies. These claims neither do lose their original legal character as insurance claims by the parties making a respite contract, nor by any other agreement falling under Article 607 alinea 2 of the German Civil Code.

Since, in conformity with the view of the court below, it appears that no judicial proceedings are admissible, the appeal from the decision of the court below is dismissed.

Sgd. Strecker Schliewen Stolzeo Frhr. v. Richthofen Warneyer. [245]

EXHIBIT "N."

Copy—Translation.

VII. 202/1929.

Pronounced the 13th of December, 1929.

(Sgd.) Merck Regierungsinspektor, as Clerk of the Court.

In the Name of the Reich.

In the Case of

Mrs. Sophie Frensdorff nee Herz of Lokstedt near Hamburg,

Plaintiff and Appellant.

Counsel: Dr. Benkard, Attorney at Law, of Leipzig

versus

The Schweizerische Lebensversicherungs und Rentenanstalt in Zurich,

Defendant and Appellee,

Counsel: Privy Councillor of Justice Dr. Junck, Attorney at Law, of Leipzig.

The Supreme Court, Seventh Senate (Division) for Civil Cases, consisting of: the President of the Senate Mentzel and the Councillors of the Supreme Court Schliewen, Dr. Freiesleben, Dr. Salinger, Dr. Warneyer, (acting) upon the pleadings held on December 13, 1929, have decided:

The appeal against the decision of the Oberlandesgericht (Court of Appeal) of Hamburg, dated February 12, 1929, is dismissed.

The appellant is ordered to pay the costs of the appeal. De jure.

FACTS OF THE CASE.

The husband of the plaintiff held a policy of the defendant company, since May 1, 1901, under which policy, in the event of his (the insured) being alive on May 1, 1922, the plaintiff was to receive an amount of 100,000 Marks. The amount insured was paid shortly before it fell due. In a previous procedure the plaintiff had claimed for supplementary revaluation and had sued for a partial amount of 5,000 Reichsmarks. Her claim was, however, finally and conclusively rejected by the Court of Appeal of Hamburg; in the Actual procedure the plaintiff claims for a further partial amount of 5000 Reichsmarks, which claim has, however, again been rejected by both the Court of First Instance and the Court of Appeal.

With her appeal to the Supreme Court the plaintiff claims for the decision of the Court of Appeal being reversed and the defendant being ordered to pay the amount sued for, whereas the defendant applies for the appeal being dismissed. [246]

MOTIVES OF THE DECISION.

The appeal has to be rejected.

The Court of Appeal has in the first line assumed that the case has to be decided according to German Law. It has then made some merely auxiliary considerations for the event that one would assume (as Plaintiff does) that the case had to be decided under Swiss law. The arguments of the Appellant that the Decision of the Court of Appeal, by mix-

ing up different laws in an inadmissible way, has decided the case at the same time under German and foreign law, miss their point.

The assumption of the Court of Appeal that according to the agreement of the contracting parties German law shall be applied appears to be correct. The Court of Appeal draws this conclusion especially from a passage (reproduced in its Decision) from the Prospectus Letter the husband of the plaintiff, by mentioning it in his Offer, is said to have acknowledged to govern the Policy, even if he should really not have taken cognizance thereof. The interpretation given by the Court of Appeal to said passage of the Prospectus Letter has to be examined by the Supreme Court, as said Prospectus Letter contains so-called "typical conditions." It can, however, be unhesitatingly admitted that, by said passage inserted in the Prospectus Letter, which generally provided for the legal relations of the Defendant in Germany with persons residing in Germany, the Defendant wanted to subject itself not only to the jurisdiction of German courts but also to German law, which subjection it could also consider to answer the interests of its German policy-holders. It is therefore, no more to inquire what law would have been applicable (either with regard to the place of performance or the domicile of the Defendant Company) if there had been no agreement between the parties. (cf. Decisions of the Supreme Court, vol. 120, Page 72).

From the fact that the insurance contract is governed by German law results as well the exclusive applicability of the Paragraphs 59 to 61 of the Ger-

man Revaluation Act and Articles 95 to 114 of the Durchführungsverordnung. For these provisions generally apply upon all claims of insured, arising out of such life insurance policies which have to be judged according to German law, and this also, if the contracts were made with a foreign company and the claims consequently were directed against such a company. Apart from the provision contained in Article 103 alinea 2 phrase 4 of the Durchführungsverordnung, — for the applicability of which no reason is given in the arguments of the parties,—there could be an exception only insofar as the case would fall under the provision of Article 115 Durchführungsverordnung, based on the authorization provided for in Para. 61 phrase 2 of the Revaluation Act. This, however, the Court of Appeal has tacitly—and rightly—denied. Phrase 3 of Article 115 cannot, it is true, be taken into consideration, because the confirmation letter addressed to the Defendant by the German Insurance Department, dated January 10, 1929, does not in itself mean a decision of the Insurance Department, and because nothing has been ascertained about such decision having been passed prior to said letter. It is, however, sufficient that neither of the parties does contest that the defendant, as foreign insurance company, is supervised since 1904 by the Insurance Department. That the policy in question was taken out already in 1901, when there did not exist any supervision at all, is of no importance; because the authorization in Para. 61 as well as Art. 115 obviously make a decisive point only of the fact whether or not the foreign company is supervised

actually, at the moment when the question [247] of the revaluation has to be decided; whilst it is of no importance whether the contracts were made before the company became subject to the supervision by the Insurance Department. This follows especially from the expression "not standing under supervision by the Insurance Department" in each of the passages (Para. 61 Revaluation Act, and Art. 115 DVO.). Furthermore, the intention of the legislator to except the respective claims arising out of life insurance policies from the regulation provided for the German Revaluation Laws only insofar as the respective company is not standing under actual supervision, and on the other hand not to attach any importance to the date when the contract was made, corresponds with the fact that the formation of a premium reserve fund (which forms the basis for this regulation of the revaluation of life insurance policies) is in principle warranted by Article 99 of the Law concerning the Supervision of Private Insurance Business also with companies which have become subject to supervision at a later period as regards claims arising out of their policies issued prior thereto. It follows, for the rest, from a comparison between life insurance policies and the three further species of insurance policies, mentioned in Para. 59 of the Revaluation Act, that it is of no consequence for the first named kind whether a premium reserve fund had to be formed by the individual insurance company, or whether it was really formed, nor whether it is ascertained that the insurer had con-

stituted a premium reserve fund just for the respective individual insurance; the Court of Appeal—has—quite correctly—expressly declared this last moment to be of no importance, whilst the other two facts obviously have never been contested at all.

But if it follows from what is said above that Paragraphs 59, 60 of the Revaluation Act and Articles 95 to 114 of the Durchführungsverordnung do apply in specie, there can by no means be argued (especially also according to Para. 62 of the Revaluation Act) that, besides a revaluation as provided for by said provisions, an additional revaluation could be claimed under the general provisions of German law, especially under Article 242 of the German Civil Code, and this mainly with regard to the foreign capital of the defendant, which had not been depreciated by the inflation (cf. also Decisions of the Supreme Court, vol. 113, page 44).

The case cited in the Writ of Appeal (Revision), decided by the present Senate (Division) by their Decision of September 20, 1929, (VII. 102/1929) thoroughly differs from the case in specie, as that case dealt with a foreign company which had been dismissed from supervision by the Insurance Department.

No more justified is the argument of the appellant that the decision of the Court of Appeal ought to be reversed, because it did not show clearly whether the claim was rejected owing to the defendant being the wrong party to the suit or owing to the claim not being materially founded. It is true that the Court of Appeal has not expressly and

sharply stated their view in this respect. But, as the existence of a trustee and of a revaluation stock is not contested, the meaning of the claim obviously was to bring forward a claim against the company [248] itself, based not on Paragraphs 59 sequ. of the Revaluation Act and the Durchfuhrungsverordnung, but on the general legislation (lying outside these provisions). Such a claim, however, the Court of Appeal has denied, declaring—correctly, as it has been exposed hereabove,—that only just these provisions are applicable, whilst it has reserved unto the Plaintiff, at the end of the motives of the Decision, the right to sue the trustee according to the said provisions. As for the rest, even without such an express reservation, the Plaintiff would not be threatened by any prejudice arising against her out of the Decision of the Court of Appeal as regards a future enforcement of her claims against the trustee, as neither the impeached Decision of the Court of Appeal, nor the present Decision of the Supreme Court, has any legal effect with respect to the trustee.

Lastly, it is true that, as it is said in the Writ of Appeal, the arguments on which the Decision of the Court of Appeal is based give way to some objections insofar as they deal with Swiss law; but, as these considerations are merely of an auxiliary character, the Decision is not based on them.

After all that has been said, the Appeal had to be rejected as being unfounded.

(Sgd.) Mentzel Schliewen Dr. Freisleben Salinger Warneyer [249]

EXHIBIT "O."

24. U. 13178.29/18.

Promulgated on the 12th of March 1930.

(Sgd.) Schwarzkopf, Justizsekretar as Clerk of the Court.

In the Name of the People.

In the Case of Carl Maria Messerschmitt of Mannheim, 9 Industriestrasse,

Plaintiff and Appellant,

Counsel: Justizrat Dr. Alfred Korn, Attorney at Law, of 3 Tauentzienstrasse, Berlin W. 50,

versus

1) The Mutual Insurance Company, "New York Life Insurance Company" of 346 Broadway, New York,

2) The same Company's Principal Branch in Germany, at present having its office at Frankfort on Main, 45 Schumannstrasse, represented by its (the Company's) Chief Agent for Germany,

Defendant and Appellee,

Counsel: Dr. Waltler von Simson, Attorney at Law, of 3a Unter den Linden, Berlin W. 8.

Concerning an amount of RM. 95 330 (claim, based on a life insurance policy).

The 24th Senate (Division) for Civil Cases of the Court of Appeal in Berlin, consisting of: Senatsprasident Pleuff, Kammergerichtsrat Dr.

Biermann and Landgerichtsrat Dr. Hirschfeld, (acting) upon the pleadings held on February 26, 1930, have decided what follows:

The Plaintiff's appeal against the Decision, pronounced on the 1st of October, 1929, by the 30th Division for Civil Cases of the First District Court (Landgericht I) of Berlin, is dismissed.

The Plaintiff is ordered to pay the costs of the appeal.

This Decision is provisionally executable.

FACTS OF THE CASE.

According to the Policy No. 1 554 035 the Plaintiff had insured his life with the Defendant Company for an amount of 100 000 German Marks. The policy (issued in [250] Berlin on December 15, 1904), bears—besides the facsimile signatures of the president and secretary, as well as of the Director General for Europe, of the Defendant Company—also the signature of its Secretary for Germany and the stamp signature of its Chief Agent for Germany. The annual premium amounted to 6 545 German Marks. Except the last premium (which had fallen due in December 1923 and with regard to the non-payment of which the defendant has not raised any objections) the Plaintiff has paid all annual premiums after deduction of the annual dividends allotted to him. As the plaintiff was still alive on December 15, 1924, he was entitled to chose, at his option, any one of (the) three different modes of settlement (provided for

in the Policy). He chose the cash payment of the guaranteed redemption amount of 121 400 Marks.

The Plaintiff now takes the view that he had been promised payment of the insurance money in stable currency, which means that, if he had also paid all his premiums up to the end of the insurance time in stable currency, he would have been entitled to claim—instead of the 121 400 (old) Marks which had been utterly depreciated by the inflation and finally, in consequence of the creation of the new currency in 1924, could not even be expressed nor paid in the shape of Marks at all,—an equal numerical amount in Goldmarks or in new German Marks (Reichsmarks), viz.: RM 121 400. As, however, the premiums had not been paid in such full value since 1918, and as further the Defendant had also declined his (the Plaintiff's) offer to make an additional payment in Gold value on account of the premiums due until the end of the insurance time, he (the Plaintiff) thinks to be entitled to demand from the Defendant payment of an amount of RM 95 220 on the basis of the calculation drawn up by him in his claim.

He has applied for the Defendant being ordered to pay him RM 95 220, plus interest and commission, as set forth in the statement of facts of the First Decision.

In support of his standpoint the Plaintiff has stated:

That the defendant is a "pure mutual insurance company," and that the policy-holders are its members; that, accordingly, the total assets of the De-

fendant are the property of the policy-holders; that the principle of the "pure mutual company" means *the* every policy-holder—regardless of his having his residence in America, England, any other country, or in Germany,—has the right to be treated in a way unconditionally equal to that in which all the other policy-holders are treated; that the Defendant in its Prospectus Letters and warranties has always ever again pointed out that it is an international company spread all over the World and that its profits and losses are borne by all its policyholders conjointly; that the claims, resulting from the policyholders' membership in the Defendant, as a pure mutual company, must be regarded, from the standpoint of law, as claims based on a special contract of reciprocity; that they (these claims) do not, of principle, fall under the special provisions relating to life insurances of the [251] German Revaluation Act, but that, on the contrary, according to Articles 62, 63 al. 3 of said Act, they must be judged in accordance with the general provisions of civil law.

(he adds:)

That the Defendant is bound to perform its obligations in stable value also because of its numerous promises, which it has ever again given to its insured both in its Prospectus Letters and through its Agents, and, most particularly, because of its assertions that it guarantees the fulfilment of its contractual obligations with its total property; that this propaganda (of the Defendant) had specially emphasized that the Defendant, being domiciled

in the United States, would be spared any perturbations caused by war, and that its policy-holders, therefore, would be protected against the economic consequences of an eventual war in which Germany might be involved; that, from a legal standpoint, these promises represent a "cautionary contract" running parallel to the insurance contract, corresponding to a case in which a security is agreed upon by the parties to safeguard them from losses caused by the fluctuation of rates; that the Defendant could not, therefore, rely on any losses sustained by it in connection with the depreciation of the German currency,—more particularly, on losses caused by the depreciation of the premium reserve funds placed in Germany; that all such losses have to be borne conjointly by all the policy-holders (of the Defendant) in all countries.

That, insofar as the question of revalorization of the insurance money, or of the cash value respectively, is concerned, such revalorization can take place only by way of free revalorization in accordance with the general provisions of the German Civil Code (Art. 242), and not, in accordance with the German Revaluation Act and/or its Durchführungsrerordnung, by way of the Trustee procedure provided therein; that, having regard to the large property owned by the Defendant throughout the World, which property has hardly been affected at all by the German inflation, there cannot be the question of a smaller revalorization than a 100% one; that the Defendant—in its en-

tity—is directly liable towards the Plaintiff, and is the proper party to be sued, and that this is true both as regards the Home office in New York and its German Representative, the Chief Agent for Germany; that the Defendant cannot refer him with his revalorization claim to the Trustee procedure.

The Defendant, on its part, has applied for the claim being dismissed.

It denies its being the proper party to be sued, and refers the Plaintiff to the Trustee procedure. It contests, especially, the Plaintiff's allegations with regard to the stability of the insurance money and the promises it (the Defendant) is said by him to have made in this connection, which promises—the Defendant argues—are incompatible with the contents of the Policy.

The District Court, by its (aforesaid) Decision, which is more fully described in the tenor of the present [252] Decision and to the cited contents of which reference is made, has dismissed the claim.

Against said (District Court) Decision the Plaintiff has lodged an appeal within due time and form, applying for: (Principaliter:) the Decision being amended insofar that his application made in the First Instance be granted: (eventualiter) for the Court of Appeal declaring that the Plaintiff has a claim against the Defendant for an amount of 95 220 Reichsmarks, including the revalorization sum eventually to be apportioned to him in the

Trustee procedure, plus interests, as enumerated in the principal claim.

The Defendant has applied for the appeal being rejected.

The parties have pleaded the case in accordance with the contents of their Briefs of First and Second Instances; the Plaintiff has also cited the contents of the Annual Report for the Year 1917, produced by him, and of the Balance Sheet per January 1, 1906, which documents are both referred to.

The parties agree: that on January 1, 1905, the Defendant had subjected itself (its German business) with its German Insurance stock to supervision by the German Insurance Department; that in the run of the litigation the Insurance Department, acting in accordance with Article 115 of the Durchführungsverordnung (Executory Decree to the German Revaluation Act) has decided—both in the procedure before its First Senate and in the procedure before its Senate of Appeal—that the Defendant is a supervised company in the meaning of said Acts; that the premiums paid on the insurance in question flowed into the premium reserve, and that a premium reserve fund was formed; that, finally, a Trustee procedure had been instituted, in which the present Policy is also included. The Plaintiff has contended in the Second Instance that he relies with his claims also on American law; the Defendant has disputed this possibility, stating that German law is solely and exclusively applicable.

MOTIVES OF THE DECISION.

The Appeal, admissible in itself, could not meet with success.

The Senate proceeds from the view that the contractual relations of the parties have to be judged according to German law. The contract has been concluded in Germany. The application and the policy are in German language. The Plaintiff was, and is still, a German National, resident in Germany. The policy was executed, for and in behalf of the [253] Defendant, also by its Chief Agent for Germany. Insurance money and premiums, both payable in Germany, are expressed in Marks; the jurisdiction of the Berlin Courts is agreed upon. After all this, there cannot be the least doubt that the parties agreed upon and that it was their will—that German law should govern. When opening the litigation both parties had also taken this for granted; more particularly, the Plaintiff also has based his argumentation in the First Instance solely and exclusively on German law. If in the Second Instance he thinks to be able to rely "also" on American law, this—as appears from his reference to some decisions of American Courts—can only mean that, according to the principles of Private International Law which are in force (and ruling) in America, American Courts have to judge, and would judge, the present contract according to American law. Whether this would indeed be the case, may, however, remain undiscussed. German Courts have

to conform with the principles of Private International Law, such as they have developed in Germany and are operative here. In this respect the unanimous will of the parties and the place of performance are of decisive importance. In the present case these two points are undubiously in favor of the applicability of German law. If the Plaintiff in this connection refers to the decisions of the Court of Appeal and the Supreme Court in the case Hirsch versus New York, it can only be pointed out that in these two decisions there is no question of applying American law.

The further handling of the Policy also was in keeping with the will of the parties at the conclusion of the contract. It was from the beginning kept with the German insurance stock of the Defendant; a premium reserve was constituted for it in accordance with the provisions of the pertinent German laws; the Policy is undisputedly included in the Trustee procedure.

After all what has been stated hereabove, there cannot be the least doubt that, according to the contractual conditions laid down in the Policy, the claim in question is a "claim based on a life insurance policy" in the meaning of Paragraphs 59 sequ. of the German Revaluation Act and Article 95 of its Durchführungsverordnung respectively, and that this claim comes from legal relations which came into existence prior to February 14, 1924, and has for its object the payment of a certain fixed sum expressed in German Marks (cf. Art. 1 of the Revaluation Act and/or Art. 95

Durchführungsverordnung.) It is undisputed and known to the Court that the Defendant is a supervised Company in the meaning of Article 115 of the Durchführungsverordnung; the German Insurance Department has finally and conclusively decided this to be the case. This Decision is binding upon the Court.

Insofar as the claim is one for revalorization of a Marks claim, there can, therefore, only be the question of a revalorization to be carried through by way of the Trustee procedure; this claim must be directed against the Trustee; the Defendant is not the proper party to be sued. Insofar, however, as the Plaintiff in the present proceedings tries to enforce against the Defendant a claim for "free" revalorization, [254] his claim must be rejected, because he is not entitled to such a claim.

The Plaintiff, who, obviously, himself feels this to be true, has now tried to support his claim by contending that the defendant, at the conclusion of the contract, had promised to him that the insurance money, and/or the redemption amount, would be of stable value, and that the Defendant had guaranteed to him that he would not suffer any losses from fluctuation of rates and/or depreciation of currency. The Policy which, at least, may be assumed to contain a complete reproduction of the total contract, does not, however, contain anything in support of this (the Plaintiff's) view. The Defendant's quality of a "pure mutual company" cannot, likewise, be turned to account for this, as it would not in the least alter

the fact of the insurance being a Mark insurance falling under German law. In the propaganda and prospectus letters, cited by the Plaintiff, neither, nothing is said anywhere about a guarantee being given by the Defendant with regard to losses caused by fluctuations of rates or depreciation of currencies. These propaganda and prospectus letters have merely the tendency to show off the Defendant as an undertaking spread all over the World and being most particularly secure and solvent. In this regard, for the rest reference can be made to the argumentation of the Judge of the First Instance. The annual reports and balance sheets of the Defendant, drawn up and published by the Defendant in Germany, neither do allow to draw any conclusion with regard to such (alleged) agreement concerning the stability of the insurance money and a guarantee against losses caused by fluctuations of rates and/or depreciation of currencies.

After all this, the claim of the Plaintiff appears to be unfounded also as regards his subsidiary application. The District Court has dismissed the case for good reasons. The appeal, therefore, had to be rejected.

The incidental decisions are founded on Articles 97, 708 of the (German) Civil Procedure Act.

(Sgd.) Pleuss. Dr. Biermann. Dr. Hirschfeld. [255]

EXHIBIT "P."

24 U. 13533. 29/28.

Published March 12, 1930.

Signed: Schwarzkopf, Court Clerk, as Recording Official.

In the Name of the People.

In the Matter of

The New York Life Insurance Company of New York, 346 Broadway, main office in Germany, Frankfort a/M 45 Schumann Street, represented by its main agent for Germany, defendant and plaintiff in appeal proceedings represented by the attorneys at law: Dr. Walther von Simson in Berlin, W. 8. unter den linden 3a, of counsel, versus Mr. Hermann Hardt of Lennep, plaintiff and defendant in appeal proceedings represented by attorney at law Dr. Alfred Korn, 3 Tauentzien Street, Berlin, W. 50.

For the amount of 20,793 RM.

Part 24 in civil matters of the Court of appeals in Berlin at the trial term of February 26, 1930, the Court being composed of Mr. Pleuss as Presiding Justice and of the Justices Dr. Biermann, and Dr. Hirschfeld, has decreed.

With regard to the appeal of defendant, the judgment of Part 30 in civil matters of the Superior Court in Berlin rendered on October 22, 1929, is reversed. The complaint is dismissed.

The costs of the action are adjudged against the plaintiff;

The judgment is provisionally enforceable pending appeal.

Defendant insured the life of plaintiff twice, namely, in accordance with insurance certificate of July 3, 1905 in the amount of 150,000 Marks of German Reichs currency, and in accordance with insurance certificate of May 8, 1906 in the amount of 50,000 Marks, Reichs currency. The payment of the insurance was to be made upon the death of plaintiff to his beneficiaries (legal successors), but in case of survival on July 3, 1925 and on May 8, 1926 respectively, to plaintiff. There were involved mixed insurances for twenty years with twenty year dividend period and progressive profit participation which is governed by No. 15 of the General Insurance terms which are an integral part of the policy. In accordance therewith, the Company is to prepare annually a profit and loss statement in accordance [256] with the principle submitted to the German Insurance Supervision Office for private insurance and accepted by it. From the yearly profit shown in this statement, the Company may transfer in favor of the policy based on the plan of progressive profit participation, to the security and fluctuation funds formed for such policy, an amount which must not exceed one fourth part of such profit. The balance of the profit will be declared as a dividend for such policies which have been in force longer than four years and on which at least five full annual

premiums have been paid. However, the policies can only claim such dividends at the termination of the fifth insurance year. The distribution of the amount declared as dividend occurs along the following lines: Policies of twenty year period which have been in existence for five full years, participate during the twenty year period in the the ratio of 1 3/6 of the annual premium; policies which have been in existence for six full years, in the ratio of 1 3/6 of the annual pjremium; policies which have been in existence for seven full years in the ratio of 1 4/6 of the annual premium, etc.; so that for each further year the amount is increased by 1/6 of the annual premium. All policies are only entitled to a dividend for the years for which premiums are to be paid in accordance with the terms. Special premiums, additions for annuity payments and supplementary premiums for premium reserves do not participate in the profit. The present policies, after having been in existence for five years, receive at the end of each insurance year, during the survivorship dividend period instead of cash dividend payments, a credit memorandum with the guaranty that an amount stated therein will be paid at the end of the survivorship dividend period if, and only if, the insured is still alive at such time and the insurance (the main insurance) is in force in its original form. This amount is the same as the insurance sum of a survivorship insurance, the single net premium of which constitutes the annual dividend. The insurance sum is figured on the basis

of the single premium, which is based on the experience set forth in a book, of which further details will be given.

The annual premium of the policy of June 3, 1905, amounted to 8080.50 marks; that of May 8, 1906, amounted to 2715.50 marks. Plaintiff paid these premiums regularly in advance up to the year 1923. The contracts, respectively policies are issued by the main agent of defendant for Germany. Among other signatures, they carry the signature of this main agent and also the signature of the Actuary of Germany, Mr. G. Bohlmann. Moreover reference is had to the cited contents of the insurance certificates, that of May 8, 1906, being submitted. Plaintiff is a citizen of the German Reich and resided and still resides in Lannep. The defendant placed itself, with its German insurance assets, on January 1, 1905, under German Government Supervision within the meaning of the law of May 12, 1901. The Government Supervision Office in the year 1929, ascertained in special court and appeal proceedings that it was to be considered as subject to Government Supervision within the meaning of Article 115 of the Enforcement Ordinance to the [257] Revalorization law. Plaintiff received the above-mentioned credit memoranda for both insurances every year regularly. The Court cites as an example the following, relative to policy 2519400 of May 8, 1906, issued on April 14, 1923, by the main agent for the German Reich.

"Communication regarding survivorship dividends. In accordance with Article 15—"Profit participation" of the general insurance terms of the

above policy, a dividend of 850 M has been declared for May 8, 1923, and has been converted into a survivorship dividend. This survivorship dividend of 992 M will be paid at the "termination of the survivorship dividend period," namely on May 8, 1926, and only then, if the insured is still alive at such time and the insurance (the main contract in the original form) is still in force." See Article 15, next to the last sentence of the general insurance terms" of the above policy.

Plaintiff alleges that the profits accumulated in accordance with the dividend credit memoranda issued to him for the policy of July 3, 1905, amounted up to the year 1923 to a total of 21,073 Marks; that for the policy of May 8, 1906, they amounted to 6651 M; "That the total amount of the accumulated profits for both insurances must therefore amount to 27,724 M; that on basis of a 75% revalorization, he demands of this total amount "the sum set forth in the prayer of his complaint of 20793 M, in settlement of his claims."

In this way plaintiff substantiated his claim in the statement of claim, in which he prays that defendant be sentenced to pay him 20793 RM plus 6% interest as from January 1, 1925.

Secondarily, plaintiff bases his claim "also on the main insurance sums of 150,000 and 50,000 Marks." He alleges that the defendant in its prospectuses and advertising material constantly called attention to the fact that in case of economic disturbances it would be liable with its entire international assets and that it had made promises therein which could only be interpreted to mean

that in contrast to German companies, it would have to pay to the insured the full value of their premium payments should an economic catastrophe occur in Germany; that this constitutes a promise of guarantee on the part of defendant for any loss in exchange and currency, against which defendant could not refer to the collapse of the German currency; that furthermore plaintiff also had a claim against defendant on basis of his membership rights. That defendant was a company of pure mutuality; that it had called attention to this not only in circulars and prospectuses but also in a large number of policies. That this principle of pure mutuality also signified the right of every insured that is, every member, to receive like treatment. That if the defendant were to place the burden of losses in currency, which it had suffered through the collapse of German currency, only upon the shoulders of its German members, whereas it had always distributed other losses uniformly [258] among all its members, this would constitute a grave violation of its contract against the German members and therefore also against plaintiff. That the provisions of the revalorization law did not apply to these claims inasmuch as there were concerned claims arising out of mutual contracts which were independent of insurance contracts. The defendant prayed for dismissal of the action. It refutes the promise of guarantee alleged by plaintiff and the remarks of plaintiff with regard to the conclusions to be drawn from its prospectuses and advertising matter and its nature as a mutual company which it does not admit within

the meaning of plaintiff's remarks. It alleges that there were concerned pure mark insurances, which, with regard to the main insurance amounts, are subject to the provisions of the Revalorization Law and the Enforcement Ordinance issued in connection therewith and can be revalorized only through trustee proceedings. That in this regard the plaintiff would have to approach the trustee. That no action could be brought against it; that insofar, however, as plaintiff claimed, revalorization in accordance with "free" principles, or possibly a revaluation on basis of the alleged guarantee, plaintiff should be dismissed, inasmuch as these claims had no justification. That the same remarks that apply to the main insurance sums also apply to the dividends. That plaintiff himself recited that all dividends entering into question, were computed annually, and were communicated to him accurately figured in mark amounts. That this fact alone shows that there were involved claims dating back to legal relations (life insurance contracts) which had been established prior to February 14, 1924, and which referred to the payment of a definite sum of money expressed in marks. That the annual dividends had not been paid out in this case. That instead plaintiff, in accordance with the contract, had received the credit memoranda and that the amounts mentioned in these credit memoranda, aside from the dividend amounts, had constituted at all times an insurance sum payable upon the expiration of the survivorship dividend period, the net premium of which, in a single sum, corresponded to the dividend declared for the respective year.

That the annual dividend had consequently been used as a premium paid in a single sum for the acquisition of a survivorship insurance. That the sum of all the survivorship insurance amounts amounted to 28992 mark in connection with the policy of July 3, 1905, and to 10314 Mark in connection with the other policy. That these amounts had been payable at the termination of the profit periods. That therefore, also in this case, there were concerned purely mark insurances dating back to the period prior to February 14, 1924. That in accordance with the Provisions of the Government Supervision Office for Private Insurances, the defendant had to invest for the survivorship insurances, special premium reserves, had to transfer them to the special premium reserve fund in their full amount and had to secure them within the German Reich.

Plaintiff denied these statements of defendant, and alleged that in connection with the dividends there was involved a profit share which in accordance with the character [259] of the defendant as a mutual company and in accordance with the general principles of the insurance law, had to be of equal value for all members of the defendant having like insurances, and which had been determined in the manner that from the total profit made there had first of all been transferred up to ¼ to a security and fluctuation fund, and the balance had then been distributed among all the insured in accordance with the amount of their premiums. The credit memoranda signified that the share of the insured as it devolved upon him in accordance with the principles of defendant, as entitled to partici-

pate in the total profit, had been set forth in writing for his information. In the case of dollar insured these credit memoranda, which, as far as their intrinsic value was concerned, was the same for all participants, had been expressed in dollars; in the case of insurance calling for pound sterling, it had been expressed in pound sterling, whereas in the case of the German insured, it had of course called for marks. The contents of all the credit memoranda, however, were of the same tenor inasmuch as the insured with progressive profit, represented a joint association of pure mutuality. With regard to these credit memoranda, therefore, there had only been determined in what amount the insured participated in the total progressive profit of the respective year, always under the uncertain condition that he would survive the termination of the survivorship period. If a dividend in the amount of 850 marks was declared in the credit memoranda, the amount of 850 marks represented the share devolving upon the insured in accordance with the premium payment. This profit participation which had already devolved upon him, could not be withdrawn from him any more. It was merely agreed that the payment to the insured would be made at a later date, namely, after the expiration of the survivorship period. In view of the fact that profits had accrued to the defendant through the deferring of the payment, the profit share devolving upon the insured for the termination of the survivorship period had been increased; in the example given, to 992 mark. The nature of the claim as a profit share, had remained entirely unaffected by the man-

ner of computation resorted to by the defendant. There did not take place, as defendant believes, a conversion of this profit share into an insurance, but only an increase of the profit claim which had already devolved upon the insured, conditioned by the later payment.

The Superior Court declared by judgment, the tenor of which is given further, and to the cited part of which reference is had, the claim to be justified in principle.

The defendant filed an appeal against this in due time and prayed the Court to reverse the judgment and dismiss the action and in case judgment be pronounced against it to permit to avert execution proceedings. Plaintiff prayed for a rejection of the claim.

He submitted a pamphlet issued by the defendant; the "Policy with Progressive Profit Participation and Survivorship [260] Dividend" and also the annual report of the defendant for the year 1913 and recited the contents thereof. With regard to other points, the parties proceeded in accordance with their briefs submitted in the 1st and 2nd instances and the documents filed. Reference is had thereto.

GROUNDS FOR THE DECISION.

The appeal, which is permissible in itself, had to be upheld. The contractual relations of the parties must be judged in accordance with the German law. The allegations and statements of the parties show that they agree in this regard. In accordance with the contents and individual (conditions) provisions of the policy, which was issued as belonging to Ger-

man assets of the defendant through their main agent in Berlin, and which provided German places of performance in both cases, there can be no doubt of this. With regard to his statements that the defendant had guaranteed to him the stability of the currency of the insurance amounts; had assured him that in all cases he would receive full payment of the amounts in gold marks and had expressly intended to protect him against fluctuations in the currency and the rate of exchange, plaintiff cannot be upheld. Nothing is contained in the insurance certificates which one may assume to be at least a complete reproduction of the entire contractual relation in favor of this. The nature of the defendant as a pure mutual insurance company cannot be construed in this manner. No change was made in this connection in the nature of the insurances as mark insurances subject to German law. Nowhere do we read of a guarantee for losses in the rate of exchange and in the currency nor do we read this in the prospectuses and advertising material cited by plaintiff which have merely a tendency to depict the defendant as a world embracing and particularly safe and solvent concern. Also the annual reports and balance sheets of the defendant which it has issued and prepared in Germany, did not permit of any deduction as to such a guarantee of the stability of the currency of the insurance sums and other performances on basis of the contracts and a guarantee for the losses in exchange of currency.

Insofar as the main insurance sums enter into question, therefore, as far as plaintiff is concerned, there can only be involved revalorization claims and

there can be no doubt that these are subject to the trustee proceedings of defendant. The same must be said with regard to the claims to dividends. Here also there are involved claims arising out of life insurance contracts which rest on legal conditions established prior to February 14, 1924, and which involve the payment of definite sums of money expressed in marks. There are not concerned here accumulation dividends as in the matter of "Gross versus New York," 24. U. 5118.27, and which the Court there considered as special claims arising out of the tontine contract in contrast with insurance claims proper arising out of life insurance contracts. [261]

There are concerned here annual dividends which are established annually in accordance with certain processes as provided by the insurance terms in a certain ratio to the premiums paid. Undoubtedly this constituted each time a claim arising out of life insurance contracts. This ascertainment was made each time up to the last time prior to February 14, 1924, in marks without any objection on the part of the plaintiff, who was always advised of this by means of a credit memorandum. This alone would give rise to all the premises for revalorization also of the dividend claims, in accordance with the revalorization law. If the Court of the first instance was of the opinion that the sum constituting the subject matter of plaintiff's claim could only be established after the expiration of the last period year and that this did not suffice to render the claim of plaintiff a definite claim within the meaning of the revalorization law and enforcement ordinance,

we cannot agree to this. What the Court below has overlooked in this connection, namely that a claim which shall be considered as definite must call for a definite amount from the very beginning of its origin and must stipulate the sum of a very definite amount, is the case here, for the claims to the yearly dividend were computed, fixed, and indicated in a credit memorandum for every individual year definitely in marks, and furthermore there was indicated the exact amount expressed in marks which was to be paid upon maturity. In this connection it is immaterial whether the interpretation of the defendant is correct, that for each established annual dividend a corresponding survivorship insurance was established with the insurance amount shown in marks in the credit memoranda, which thereupon became due upon the focal day in case of survivorship. The Court, however, must recognize that this interpretation of the defendant fully conforms with the meaning and sense of Article 15 of the General insurance terms, and also the procedure followed and the credit memorandum thereupon issued and accepted without objection by plaintiff. Therefore, as appears from the official report of the Government Supervision Office of February 15, 1928, in the matter 62.0.419.27 of the Superior Court of Berlin I which report has been submitted by the defendant as unrefuted, the Government Supervision Office, which ratified this kind of life insurance, considered the various dividends as a premium paid in a single amount for the acquisition of a survivorship insurance.

The defendant had to treat the reserves for these

additional insurances not as profit reserves, but as premium reserves, had to transfer them every year in their full amount to the German premium reserve fund had to invest them in accordance with the provisions of the insurance supervision law and had to secure them within the German Reich. If, therefore, there is clearly concerned here a kind of new additional insurance to the main insurance dating back to a date prior to February 14, 1924, with definite insurance amounts expressed in marks, there can be no doubt of the application of the revalorization law, inasmuch as the defendant is undoubtedly, as decided by the Government Supervision Office, an enterprise subject to Government Supervision within the meaning of Article 115 of the Enforcement [262] Ordinance. The interpretation of the plaintiff that in connection with the Mark sums set forth in the credit memorandum there is concerned only the fixing of plaintiff's share in a total profit, is not confirmed by the pamphlet submitted by him with regard to the policy with progressive profit participation and survivorship dividend. The remarks therein rather confirm the position of defendant. Reference is had to pages 14 and 15. After 7 years, for instance, the insured knows on what survivorship dividend payment he can depend, on basis of the surpluses existing up to the end of the seventh year. He needs only to add the amounts which have been communicated to him and in connection with which the above-mentioned influence of interest payments and transmission had already been taken into consideration. The insured may depend on the fact that these amounts will not

be changed with the same certainty with which he figures on the payment of the insurance sum at the time of his death, for the reserve, which secures the payment of his survivorship dividends, indicated in the certificates already issued, is deposited for the German insured in the same manner as required by law in the case of premium reserve funds, what the amount of the survivorship dividends devolving upon his policy will be in the following insurance years, namely in the 8, 9 and subsequent years, cannot as yet be predicated at the end of the 7 insurance year. In the case of the two policies in question here we are not concerned with "following years" but with the years up to 1923, in all of which the certificates have been issued and delivered, namely, credit memoranda, in accordance with which therefore the declared mark sums were established. We are concerned with the dividends computed, as calculated on the day of computation and in the amount in which they should be paid out in the case of survivorship. They will thereupon always be treated and secured as additional insurances, certified by the "certificates" to be equivalent to credit memoranda, and covered and protected as such by premium reserves and premium reserve funds under the Supervision of the Government Supervision Office for Private Insurances. All contrary interpretations of the plaintiff are doomed to failure in view of these facts.

Plaintiff therefore is vested only with revalorization claims in connection with principal sums and dividends and only with such claims as result in accordance with the revalorization law and the En-

forcement ordinance via, trustee proceedings. With regard to such claims, no suit can be instituted against the defendant. Insofar as the plaintiff has filed broader claims, they have no basis in fact.

Consequently the action had to be denied. Ancillary decisions rest on Article 9, 708 of the Code of Civil Procedure.

Signed: Pleuss. Dr. Biermann. Dr. Hirschfeld.

Issued in Berlin on March 25, 1930.

I. G. Wegner, Court Clerk. [263]

EXHIBIT "Q."

Reference Number:
0/49/1928 ad. 4.
Promulgated the 27th day of Jan., 1930.
(Sgd.) Herget, As Clerk of the Court.

In the Name of the People.

In the Case of

Ernst Marx, Owner of Brickyards of Mainz,
Plaintiff,

Counsels: Dres. Kramer & Kallmann, Attorneys at Law, of Mainz,

versus

The Mutual Insurance Company, New York Life Insurance Company, of 346 Broad Way, New York, represented by its Chief Agent for Germany,
Defendant,

Counsels: Dr. Pagenstecher, Jacoby & Dr. Ritter, Attorneys at Law, of Mainz.

For recovery of a claim.

The 1st Chamber for Civil Cases of the Hessian Provincial Court in Mainz, consisting of the following Judges: Dr. Junck, President of the Provincial Court, and Lanz & Dr. Böckel, Councillors of said Court, (acting) upon the pleadings held on January 6, 1930, has decided as follows:

FACTS OF THE CASE.

The Plaintiff had insured his life with the Defendant Company in the year 1905 for an amount insured of 15,000 Marks. For this insurance contract the Policy No. 1560153 was issued under the date of July 22, 1905. The "General Conditions" printed on the Policy provide i. a. under [264] Clause 15 for a progressive participation of the insured in the profits of the Company in the form of Pure Endowment (Erlebensfalldividende), payable in the event of his being alive on a certain date. The claim to such Pure Endowment was to mature upon the expiration of a Twenty-Years Accumulation Period, i. e., on July 22, 1925. The Plaintiff now claims for payment of said Pure Endowment and has made an application for

> the Defendant being ordered to pay him the dividends, due to him under the life insurance policy No. 1560153 and accrued during the years 1909 to 1925 inclusively, amounting to 2942 Reichsmarks, plus 7% interests since July 22, 1925; the Defendant being further ordered to pay the costs of the proceedings; and for the Decision (to be passed by the Court) being declared to be provisionally executory—eventu-

ally against security to be given by him (this Plaintiff).

In substantiation of his claim the plaintiff has stated:

That the claim to dividends, payable in the event of the insured being alive on a certain date, is not an old monetary claim, subject to revalorization, but the expression of a participation and of a right arising from a membership; that it follows already from this fact that it is not a claim falling under the German Revaluation Act; that, even if one would assume it to be a claim in the sense of Article 194 of the German Civil Code, a full (100%) revalorization would have to take place under Article 63 al. 2 No. 1 of the Revaluation Act, according to which claims based on contracts of association and other relations of participation do not fall under the (general) restriction of the revalorization to 25% of the Gold value of the claim; that, according to the general revalorization provisions, contained in Art. 242 of the German Civil Code, a revalorization up to 100% is justified in the present case without further ado, because the Defendant is a Company which has its domicile abroad and has suffered but comparatively small losses in connection with the depreciation of the German Mark; that its values invested in Germany has represented but an infinitesimal percentage of its total assets; that, as regards the exact amount (in figures) of the claim, it must be borne in mind that the Defendant, according

to its own communications, had credited to him—the Plaintiff—in the years 1919 to 1922 dividends of a total amount of 2065 Marks; that, also according to communications of the Defendant, the dividends for the years 1923, 1924 and 1925 had amounted to 192,90, 202,20 and 211,35 Marks respectively, which amounts corresponded to Pure Endowments of 207, 210 and 211 Marks; that the total Pure Endowment, payable upon the expiration of the Twenty Years Accumulation Period, is 2942 Marks; that, therefore, the claim is justified; that, apart from the fact of the claim not being one arising out of a life insurance policy, the applicability of the Revaluation [265] Act (on which the Defendant relies quite unjustly) is frustrated also by the fact that the claim to the dividend has not for its object the payment of a definite sum expressed in Marks, but that it must be computed from time to time from different and varying elements; that, furthermore, the Defendant is liable also under a promise of guarantee; that, in its Prospectus Letters, it has pointed out that it is liable in its whole estate also in the event of economic perturbations; that it cannot, therefore, rely now on the depreciation of the German Mark.

The Defendant has made an application for the claim being dismissed with costs.

It (the Defendant) has stated:

that it is a supervised insurance company; that, in accordance with Article 86 of the Act

(of May 12, 1901) relating to the Control of Private Insurance Business, it has been authorized under the Concession (Zulassungsurkunde of October 8, 1904, to carry on a life insurance business on the territory of the German Reich, subject to the restrictions contained in Art. 90 al. 2 of said Act of May 12, 1901; that, accordingly, it had been obligated to constitute a premium reserve fund; that, thereby, the requirements of Para. 59 sequ. of the Revaluation Act and Articles 95 sequ. of its Executory Decree (Durchführungsverordnung) of November 29, 1925, are fulfilled; that, consequently, the Plaintiff has to be referred with all his claims to the "revaluation stock procedure" (Aufwertungsstockverfahren) and to the Trustee appointed for carrying out such procedure; that the Plaintiff neither can rely on the claims asserted by him being not a claim based on a life insurance policy but a claim based on a participation; that the dividends, provided for in Clause 15 of the General Conditions, merely consist of the surplus not required by the insurance company for meeting (the ordinary) claims of its policy-holders; that the premium which has to be paid in by the policy-holder is calculated so as to exceed the amount which—from the standpoint of technicals and mathematicals—is required for the payment of the face value of the policy; that, by such increased premiums, the insurance companies, in order to avoid difficulties, use to procure the funds required for meeting

increased demands resulting f. i. from unforeseen mortality; that, in other terms, a reserve fund for unforeseen emergencies is created by means of this increase of premiums; that, thus, as a rule, the policy-holder overpays his premiums; that this overpayment is then compensated by the way of the so-called dividends which, from the standpoint of economics, correspond to a certain discount allowed on the premiums; that, in the present case, the dividends had been fixed annually; that the amount fixed had, however, neither been paid out nor used for reduc*ed* the premiums; that, on the contrary, according to Clause 15 of the General Conditions, the dividends had been used for procuring an Additional Amount to which the [266] insured was entitled in the event of his still being alive on a certain date; that this Additional Amount (Pure Endowment), which is also expressed in a definite sum of Marks, falls under the Revaluation Act; that the claim to such Pure Endowment can, therefore, be enforced only against the Trustee appointed (in and) for the "revaluation stock procedure; that, under the circumstances, the claim can neither be regarded to be justified from the standpoint of the promise of guarantee.

As regards the further very detailed statements of the Parties, reference is made to the briefs exchanged and to the total contents of the files.

The Plaintiff i. a. relied on the Decisions of the District Court (Landgericht I) of Berlin in the

cases of Saffran versus New York Life and Harth versus New York Life (62.0.202/27) and (62.0.602/27) as well as on the Decision of the Berlin Court of Appeal, dated July 10, 1929, in the case of Gross versus New York Life (24 U. 5118/27), copies of which Decisions he produced. To these copies of said Decisions reference is being made. Reference is likewise made to the Decision of the (German) Insurance Department, dated February 13, 1929, and to the insurance policies produced.

MOTIVES OF THE DECISION.

The Plaintiff claims for the dividends—to which he has a title under Clause 15 of his insurance policy, dated July 22, 1905,—being revalorized under Article 242 of the German Civil Code, that is to say by way of free revaluation according to the generally recognized principles. The Defendant refers him to the so-called "revaluation stock procedure." It is, therefore, to be examined whether the general and special requirements for the application of the Revaluation Act are fulfilled.

In the first line, it is beyond all doubt and also uncontested by the Parties, that German Law is applicable to these claims based on the policy, dated July 22, 1905, which was concluded in Germany with a German National. According to the General Conditions governing the Contract, both the place of performance and that of the generally competent court are in Germany.

It is further uncontested and also finally (undisputably) established by the Insurance Department in their Decision of February 13, 1929, that the

Defendant is to be regarded as "supervised company" in the meaning of Art. 115 of the Durchführungsverordnung of November 29, 1925.

The only question open is whether the special requirements of Art. 95 of the Durchführungsverordnung of November 29, 1925, are fulfilled. According to this provision, subject to revaluation under Paragraphs 59 sequ. of the Revaluation Act are all claims based on life insurance policies, for which a premium reserve fund [267] in the meaning of Articles 56 sequ. of the aforesaid Act of May 12, 1901, (Act relating to the Control of Private Insurance Business) had to be constituted prior to February 14, 1924, either according to the general laws or according to a (special) Order of the Supervisory Board (Insurance Department). The claims, further, must arise from legal (contractual) relations created prior to February 14, 1924, and must be directed to the payment of some definite sum expressed in old Marks, or in some other inland currency which is no more valid. That the Defendant had to constitute a premium reserve fund was the direct consequence of it having become subject to supervision by the Insurance Department in 1904, and this fact has never been contested. Doubtful and disputed between the Parties, however, is the question, whether the participation provided for in Clause 15 of the General Conditions is a claim based on a life insurance policy and directed to the payment of a definite sum expressed in (old) Marks.

The policy, issued with regard to the contract concluded between the Parties, consists of two com-

ponent parts. On the one hand, it gives to the insured a title to the payment of the face value (principal amount insured), falling due on July 22, 1930,—if the insured does not die prior to that date. Besides this, the Plaintiff is entitled to a participation in the profits of the Company under Clause 15 of the General Conditions. But this second claim also is a claim based on an insurance policy. This follows not only from the fact of it being outwardly connected with the life insurance policy. It is also inseparably connected with the policy both from an economic and legal standpoint. It always depends on the insurance (principal insurance policy) being still in force. Furthermore, a claim to dividends can be due only to a policy-holder, whilst, on the other hand, each holder of such a (Participation Class) policy has also a title to the dividends. But, also apart from this close external and internal connection with the principal claim, the claim dividends is in itself an insurance claim. From a strictly legal standpoint the participation as provided for in Clause 15 of the General Conditions is not formulated so as to give the insured an immediate title to the dividends. The annual dividends which, as a rule, fall to the insured are, on the contrary, used as a unique premium paid for purchasing an Additional Amount (Pure Endowment), payable in the event of the insured being still alive on a certain date (cf. the text of the policy, where it is said that the policy, after three years duration, shall at the end of each insurance year during the Twenty Year Accumulation Period be granted, instead of cash dividends, a

certificate guaranteeing that a certain amount indicated therein shall be paid out at the end of said Accumulation Period, only and solely if the insured is still alive at that time and if the insurance-principal policy—is still in force in its original form; and that this amount shall be equivalent to the Pure Endowment of an Additional Amount, payable in the event of the insured being still alive, of which the annual dividend is the unique net premium). The dividend computed for the single insured is, [268] accordingly, meant merely to serve as premium for such Additional Amount and in itself does not at all form the object of an independent claim. The Insurance Department in their information of February 15, 1928, (Annex to the Defendant's brief of January 18, 1929) declares also that, according to the Business Plan, approved when the Defendant was permitted to carry on its business in Germany, the dividend was used a unique premium for purchasing a Pure Endowment (Additional Amount), payable in the event of the insured being still alive on a certain date, and that the Insurance Department regarded this Pure Endowment as a formal additional insurance. The Defendant, therefore, was bound to treat the reserves for this additional insurance not as profit reserves but as premium reserves, had to convey them, annually in their full amount, to the German Premium Reserve Fund, to invest them in accordance with the provisions of the aforesaid Act of May 12, 1901, (relating to the Control of Private Insurance Business) and to securely place them within Germany. The argumentation of the

Berlin Court of Appeal in its Judgment of July 10, 1929,—(Gross versus New York Life), 24. U. 5118/27, is not applicable to the present litigation. The litigation decided by said Decision dealt with another policy form, which had been usual with the Defendant Company before it was officially admitted to carry on a life insurance business on the territory of the German Reich. This form provided for another kind of participation, namely for the accumulation of the dividends during a certain period (Dividend Accumulation Period). This system of dividend distribution which, indeed, has not the character of an insurance claim, the Defendant had to abandon with regard to its German business, upon becoming subject to supervision by the German Insurance Department. Beginning from January 1, 1905, the Defendant could issue life insurance policies in Germany only under an amended Participation Plan, on which also this present claim is based.

Although it is a fact that the Plaintiff has not an immediate claim to participation, but merely a claim to a Pure Endowment, the applicability of the German Revaluation Act depends on the further question as to whether this claim is directed to the payment of a definite sum expressed in Marks. This question is, in principle, to be answered in the affirmative. It is true, indeed, that the claim to participation, as a future claim, came into existence already at the conclusion of the contract and that it was not yet definite at that moment, but that, on the contrary, its exact amount in figures depended on a number of still uncertain

elements lying in the future. But this is not decisive. The term "definite" in the sense of Para. 1 of the Revaluation Act and Art. 95 of the Durchführungverordnung does not mean that the claim was from the beginning expressed in a definite amount of old Marks (cf. f. i. Mügel, 5th ed., page 338). It is sufficient (for the purpose of the law) that (the amount of) the claim was fixed prior to the stabilisation and was then affected by the depreciation. In the present case the amount of the participation uncertain at the beginning was fixed at the end of each insurance year during the Twenty Year Dividend Accumulation Period in such [269] a manner that the dividend falling to each single insured was established as a unique net premium of a certain Additional Amount. Besides, the insured was to get a certificate guaranteeing that a certain amount indicated therein would be paid out at the end of said Twenty Years Period, provided that the insured were still alive on that date and the policy were still in force. Consequently, a further amount of the Additional Amount (Pure Endowment) to which the Insured had a title was fixed annually in exact figures. As *this* amounts were fixed in German Marks and thus were afterwards swallowed up by the depreciation, the provisions of the German Revaluation Act apply to the present case. According to Art. 59 sequ. of the Revaluation Act and Art. 95 sequ. of the Durchführungsverordnung the Plaintiff can assert his claims only in the "revaluation stock procedure"—also as regards the claim to

the Additional Amount, based on the participation in profits—in which procedure, for the rest, only the Trustee, and not the Defendant Company, can be sued.

It is true, however, that at the moment when the stabilisation set in, only the Pure Endowments for the years up till 1922 inclusively had been fixed in the form required. For the years 1923, 1924 and 1925 the amount of the Pure Endowments was yet not fixed. In so far the Revaluation Act can, therefore, not be applied. But this has by no means for consequence that the applicability of said law becomes doubtful also as regards the Pure Endowment which had been fixed in exact figures at an earlier date. It is true that the policy of the Plaintiff provided for a Twenty Years Dividend (Pure Endowment) Period. But for the applicability of the Revaluation Act it is not required that all Pure Endowments of said Period were fixed in exact figures. The claims fixed at the end of each insurance years, for which certificates with guarantee promise were issued, are independent claims and, therefore, the question of the applicability of the Revaluation Act upon such (fixed) claims must be examined, regardless of the fact whether or not the later claims of the still current Pure Endowments Period are already fixed.

As regards the claims of the Plaintiff for Pure Endowments due up to the year 1922, the action, therefore, has to be dismissed already now. As regards the claims which came into existence after

that time, it can merely be stated now that the Revaluation Act, in principle, does not apply thereto. A final decision cannot be taken yet, as it is quite uncertain what amount might be awarded to the Plaintiff in this connection. According to the Information of the Insurance Board of February 15, 1928 (mentioned hereabove) the reserves for the Pure Endowments had to be conveyed to the German Premium Reserve Fund up to their full amount and consequently have been completely swallowed up by the depreciation. It must, therefore, be [270] ascertained whether, and up to what amount, the Plaintiff in these (real) circumstances has any claim to dividends for the years 1923 to 1925.

Taking into consideration all that has been set forth above, it appears therefore justified to pronounce the following

Partial Decision:

In so far as the Plaintiff claims Pure Endowments up to the year 1922 inclusively, his claim is rejected as being unfounded.

The question of costs is reserved to the final decision.

(Sgd.) Dr. Junck Lanz. Dr. Böckel. [271]

EXHIBIT "R."

JUDGMENT OF THE SECOND CIVIL DIVISION OF THE COURT OF APPEAL OF MUNICH OF APRIL 15, 1929.

RECORD: L 845/28 II.

Value of the matter at issue: 12,000.—RM.

The Second Civil Division of the Court of Appeal of Munich, consisting of the Divisional President, von Biegeleben, acting as President of the Court and of the Court of Appeal, Justices Riffel and Dr. Adelmann, has on the basis of the arguments heard on March 25, 1929,

In the Matter of

Protective Association of the Holders of Foreign Insurance Policies, a registered association having its head office at Munich, represented by its President, Mr. A. W. Sellin, a former Colonial Manager of Munich, plaintiff and appellant, Dr. Artur Mayer of Munich, of counsel,

versus

The Swiss Life Insurance and Annuity Institute of Zurich, a mutual insurance association, having its head office at Zurich, represented by its Managers, Dr. Schaertlin and Dr. Koenig, defendant and appellee, Justice Edward Brinz

of Munich, of counsel, for the ascertainment of legal relationships (TRANSLATOR'S NOTE: A judgment is primarily intended for the recovery of rights; the German Code of Civil Procedure considers in Par. 256 the possibility of a judgment merely intended to establish the existence or non-existence of a legal relationship or legal condition either by way of interlocutory judgment or by way of final judgment), rendered the following judgment:

The appeal brought by plaintiff against the judgment of the Court of Original Jurisdiction for the 1st District of [272] Munich of May 22, 1928, is hereby dismissed.

Plaintiff shall bear the costs of the appeal.

This judgment is provisionally enforceable.

FINDINGS OF FACT.

By decision of the Chancellor of the Reich of June 15, 1904 defendant was granted, pursuant to Par. 86 of the law on private insurance concerns of May 12, 1901, license to transact a life insurance business in the territory of the German Reich. Defendant maintains since then within the territory of the Reich an office and has appointed for Germany a main agent, which has its domicile within the territory of the Reich. At the time to be considered in this case, i. e. in December 1918, Dr. Ruf of Munich was the main agent for Bavaria.

Pursuant to Par. 12 of the 4th Ordinance for the carrying into effect of Art. 1 of the Third Taxation Emergency Ordinance of August 28, 1924, Dr. Hans Brix of Munich was appointed by the Office of the

Federal Superintendent of Private Insurance on November 24, 1924, as trustee of defendant; this appointment was confirmed on December 28, 1925 by the Office of the Federal Superintendent pursuant to Articles 110 and 135, Subsection 1, of the ordinance for the enforcement of the valorization law of November 29, 1925, such confirmation to take effect as from July 15, 1925.

Among the German paper mark insurances written by defendant there is a life annuity insurance covered by Policy A 208839, made out in the name of Friedrich Wilhelm Karl Max Haessler of Munich for a life annuity of 1,107.80 M. payable on December 11, the first payment becoming due on December 11, 1919. The insurance contract forming a basis of this policy was made on December 16, 1918 at Munich by and between Haessler and the main agent of the defendant for [273] Bavaria, Dr. Ruf. Haessler was insured against payment of 20,000 M. to which there were added 2.50 M. for policy tax and 100 M. for federal stamp duty for an annuity of 1,107.80 RM becoming due on the 11th of December of each year. Among the insurance terms the following are to be pointed out:

Par. 2. "For the performance of its obligations the Swiss Life Insurance and Annuity Institute is bound to the policy holder with all its assets. The policy holder has on the one hand no right to any surplus shown by the balance sheets and on the other hand he may never be regarded as liable to contribute to any deficits or shortages that may appear from the balance sheet; the annuity is guaranteed and unchangeable."

Par. 3. "The contents of the policy and of the additions thereto are regarded as approved by the insurer if the insurer fails to raise objection against the correctness of the policy within one month from the tender of the policy. The right of the insurer to contest his approval on the ground of error is not affected by this clause."

Par. 11. "Assignments and pledging of insurance claims are effective against the Institute upon notice thereof being given in writing by him who is entitled to the insurance."

The annuities which became due on December 11, 1919, 1920, 1921 and 1922, amounting each to M. 1,107.80, were paid to Haessler; he acknowledged receipt without reservation in each individual case; by letter of December 11, 1922 with attached receipt he had requested defendant to remit the amount due. Subsequently defendant stopped the payments and sent Haessler to get satisfaction out of the valorization fund existing in Germany and out of the valorization share [274] devolving upon him out of such stock. In March, 1919, defendant had discontinued writing life annuity contracts in Germany.

The Protective Association of Holders of Foreign Insurance Policies to which Haessler had assigned his claims, giving written notice to defendant of such assignment on December 8, 1927, requests by this action an ascertainment to the effect that defendant is bound outside of the valorization proceedings established by the valorization law, to make good the deficiency or shortage arising from the difference between the amount of the annuity

payments corresponding to the share of the policy in question in the German valorization stock and the full gold value of the annuities which have become due and are to become due in the future.

The Court of Original Jurisdiction for the First District of Munich by judgment of May 22, 1928, dismissed the action substantially upon the following grounds:

The insurance claims have been legally assigned by Haessler to plaintiff; the action for ascertainment of legal relationship is proper. The insurance contract should be adjudicated upon according to German law. Defendant is subject to federal supervision; the valorization claim of plaintiff is therefore governed by the provisions of Articles 95–114 of the ordinance for the enforcement of the valorization law. No assurance of the stability of the value of the life annuity has been given; Haessler has not interpreted the general laudatory statements of Dr. Ruf as a promise of stability of value; he accepted the insurance policy without objection; also subsequently he raised no objection to its contents and accepted the annuities which became due in 1919, 1920, 1921 and 1922 without reservation as constituting a [275] performance of the contract; plaintiff, therefore, has no further claim beyond the valorization claim according to the enforcement ordinance.

Service of this judgment was made on May 25, 1928. On June 25, 1928, plaintiff brought appeal. He prays:

To set aside the judgment of the court below, and to declare that defendant is bound, aside from

the valorization proceedings, according to the valorization law, to make good the deficiency or shortage which arises from the difference between the amount of the annuities corresponding to the share of the policy in question in the German valorization stock and the full gold value of the annuities which fell due since 1919 and are to become due hereafter. Defendant prayed for the dismissal of the appeal with costs.

In support of these prayers it is submitted:

a) on the part of plaintiff:

The will of the contracting parties at the time of the conclusion of the insurance contract was to the effect that not the principles of German law but Swiss law were to apply. Defendant was operating its business under a concession and has been formerly under the supervision of the Office of the Federal Superintendent but it could, nevertheless, not be regarded as subject to the supervision within the meaning of Art. 115 of the Enforcement Ordinance. Wrongfully has the court below answered in the negative the question whether the life annuity had been guaranteed to Haessler in accordance with its gold value. That the stability of the value had been guaranteed appears from the policy, from the publications of defendant in the newspapers, from its circulars as well as from its letter to Ulrich Wiedemann of January 7, 1919 (Page 6).

b) on the part of defendant: [276]

The action for the ascertainment and declaration of legal relationship is improper because plaintiff has the possibility of sueing for performance. The

insurance contract is subject to German law. As to what law should be applicable no intimation was made at the time of the conclusion of the contract, and on the other hand only such agreements as are contained in the policy and in the application for insurance are binding and effective—Par. 1 of the insurance terms.—Defendant stands under the supervision of the Office of the Federal Superintendent for Private Insurance. Defendant has transferred its reserves invested in Germany to a trustee appointed by the Office of the Federal Superintendent for the formation of a valorization stock pursuant to Art. 97 of the enforcement ordinance. Under such circumstances the provisions of Articles 95–114 are the only ones controlling of the enforcement ordinances. There has, therefore, been no assurance of the stability of value. That defendant is liable with its entire assets is a matter of course, but it is liable only to the extent of its original obligation or indebtedness expressed in marks which as such has become worthless and is now to be valorized in accordance with the provisions of the German law. Par 2 of the insurance terms has no bearing on the question of the currency; no objection against the policy (Par. 3 of the insurance terms) was raised by Haessler who has received payment of the life annuity up to the year 1922 without any reservation.

The offers of proof of the parties appear from the record of the hearing of November 8, 1928 (Page 36), to which reference is made. [277]

GROUNDS OF THE DECISION.

I.

The appeal is lawful and has been taken also in the manner and within the term contemplated by the law, but it is substantively ungrounded.

II.

The requirements of Par. 256 of the Code of Civil Procedure under which an action for ascertainment and declaration of a juridical relationship is admissible are fulfilled. Between the parties there is a controversy as to the extent of the rights vested in plaintiff as the successor of Haessler under the contract of December 16, 1918, in particular as to whether plaintiff has merely a claim to the share which devolves upon him in the proceedings to be carried out in accordance with Par. 59 and following paragraphs of the valorization law, or whether aside from his claim for valorization enforced by these proceedings, he has a claim to full valorization of the life annuity agreed upon. Plaintiff, as protective association of persons holding similar claims, has a legal interest to have it ascertained as soon as possible whether the claims, the protection of which it purposes, are actually existing. This legal interest would have to be denied if plaintiff were in a position to bring an action for performance. This is, however, under the stand taken by him, impossible for him.

He believes that he can participate in the valorization proceedings (Par. 59 and subsequent paragraphs of the valorization law and Art. 95 and sub-

sequent articles of the enforcement ordinance) and to draw the share devolving upon him, as a consequence of such proceedings; he wants to sue defendant only for the deficiency. He is, therefore, for the time [278] being not in a position, under the stand he has taken, to figure out the amount of his claim. Under such circumstances the action for the ascertainment and declaration of a legal relationship is proper and admissible.

III.

Haessler's claim originating from the contract of December 16, 1918, and transferred to plaintiff by proper transfer, for the payment of the life annuity stipulated in paper marks, is in itself his by the depreciation of the currency; it has become fully depreciated. (Par. 1. Valorization Law.) This is a case of a life annuity contract made with a life insurance company which is to be considered as a life insurance within the meaning of Par. 59, Subsection 1 of the valorization law. As the insurance was made prior to February 14, 1924, and as the claim bears on the payment of a definite sum of money expressed in marks, the valorization is in itself governed by Par. 59 and following paragraphs of the valorization law and by Art. 95 and following articles of the enforcement ordinance of November 29, 1925, enacted pursuant to Par. 61 of the valorization law. This would not be the case if as contended by plaintiff:

a) The insurance contract of December 16, 1918, were to be adjudicated upon, not according to German law, but according to Swiss law;

b) The claim at issue were a fixed value claim, i. e. a claim which is not hit by the depreciation of the currency;

c) Defendant were to be regarded as a concern not standing under the supervision of the Federal Superintendent within the meaning of Art. 115 enforcement ordinance. [279]

Considerations as to contention a): The question whether German law is to be applied to the insurance contract of December 16, 1918, has been answered in the affirmative by the court below with proper grounds. Were not the contract governed by German law, the valorization law and the enforcement ordinance would, of course, find no application, but also a valorization according to general provisions of law (Par. 62 Valorization Law) would not enter into question (Frankenstein, International Private Law, Volume II, Pages 226 and 227). The contracting parties were at liberty to submit themselves to a definite system of law in advance by an agreement in the form of a legal transaction. They have not done so explicitly. It is possible, however, to establish their actual or at least their presumable agreement. Defendant is admitted to the transaction of business in Germany. The contract was made by the main agent of defendant for Bavaria in Munich; the sums to be paid were laid down in German currency; at Munich Haessler paid the 12,000 M. and at Munich were paid to him by the defendant, through defendant's main agent, the annuities in the years 1919, 1920, 1921 and 1922; for actions and suits arising from this insurance business transacted in Germany, jurisdiction was

vested in the courts of the place of the German Office, i. e. Munich. (Par. 89 Valorization Law.) To such contracts German law is applicable. It can be assumed, without any further proof, that the parties wanted to submit themselves to German law. The paramount and controlling intention of the parties is apparent from the insurance contract and from the policy. (Federal Supreme Court 118, 282—Konige-Peterson Comment 1 a.E. on Par. 68, Comment 4 on Par. 86 and Comment 14 on Par. 59 of the valorization law. Ges. Staub Annex, Comment 6 on Par. 372 of the Code of Commerce. Federal Supreme Court March [280] 12, 1928, and January 27, 1928, Jurists' Weekly 1928, Page 1196.) If, as contended and as *sort* to be proved by plaintiff, the intention of the parties had been that the policy was not to be governed by the German law and the Swiss law was to find application to the policy, this ought to have been set forth in some manner in the application for insurance or in the policy. From them, however, as pointed out above it is just the contrary that is to be inferred, i. e., an agreement to the effect that German law was to find application.

Plaintiff himself does not contend that the intention alleged by him found expression during the negotiation for the contract or in the contract itself. He contends merely that there was the intention that Swiss law would be applicable. Controlling is, however, not the intention of the parties, but their manifested will. This, as pointed out above leaves no room for any doubt that the German law is to find application.

Considerations as to contention b): Also the question whether there was promised and agreed the stability of value of the annuity is to be answered in the negative as has been done by the court below. The claim of Haessler bore on a fixed amount of M. 1,107.80 a year. There was no specification of gold marks or pre-war marks. Nor was a standard established according to which this yearly payable amount was to be computed so as to have a revision of the fixed amount made whenever the relation of the domestic currency to the standard was to undergo a change. (Mugel Comment 7 on Par. 1 of the valorization law.) The contracting parties did not think of a far reaching change of value or of a collapse of German currency as has actually occurred, and consequently did not make any provisions for such a case. [281]

By his advertisements in the papers and by his circulars defendant intended only to point out in the form of a general eulogy the reliability and safety of his undertaking. When defendant referred to the invariability of the annuity, he intended merely to state that the annuity would be paid in the amount agreed upon regardless of the business losses and profits of the company; defendant did not mean to express thereby that defendant guaranteed the intrinsic value of the annuity. Even when Dr. Ruf, as contended by plaintiff, told Haessler that he should invest his money in Switzerland if he wanted to secure protection against a collapse of the currency in Germany or against bankruptcy of the State, that the annuity would always and everywhere be paid in an equal sum,

he did not intend, as Haessler knew, to promise the payment of a stable value annuity, but only that Haessler should have, as to his claim made out in marks, always a solvent debtor. Had something different been contemplated, the application for insurance and the policy would have been differently worded. The most clear proof of the correctness of the assumption that the stability of the value of the annuity was not agreed upon is supplied by the circumstance that Haessler accepted payment of the annuity in paper marks up to the year 1922 inclusive, without raising objection, and even requested explicitly in the year 1922, Dr. Ruf to remit the sum of M. 1,107.80, having first brought forward his claims several years later. Whether he intimated in the year 1923 that defendant defaulted his commitments and rejected all settlements suggested is a matter of no consequence. Irrelevant is likewise the proof offered, that plaintiff has accepted payments of the annuity under the stress of the circumstances and provisionally without any intention of waiving his rights. There was nothing to prevent [282] him to refuse acceptance or to receive the payment only under protest; a purely mental reservation is immaterial. He must allow his conduct to be interpreted against him as demanded by the principles of good faith and trust.

Consideration as to contention c): According to

Art. 115 of the enforcement ordinance the valorization proceedings according to Articles 95–114 of the enforcement ordinance do not apply in the case of claims from life insurance contract which have been

made with foreign concerns not standing under federal supervision. In the case of these claims one has to abide by the general provisions of the law, i. e., by Par. 242 of the Civil Code, provided, of course, as pointed out above, German law is to find application. Whether a concern is to be regarded within the meaning of this provision as not standing under federal supervision is an issue, the final decision of which rests with the Office of the Federal Superintendent for Private Insurance, the decision to be arrived at by the proceedings contemplated in Paragraphs 73, 74 and 84 of the law on the supervision of insurance (Art. 115 and art. 101, Subsection 3 of the Enforcement Ordinance). To these proceedings only the concern and the trustee are parties within the meaning of Par. 73 Subsection 7, and Par. 74 of the law on the supervision of insurance, to the exclusion of all other parties, even the creditors. Creditors are restricted to protect their interests by submitting representations to the supervision authority. (Mugel Comment on Art. 113 of the enforcement ordinance.)

Plaintiff is, therefore, not in a position to bring about a decision of the Office of the Federal Superintendent for Private Insurance. The office has on the other hand informed the attorney for plaintiff by communication of February [283] 2, 1929, that there is no necessity for such a decision because it is unquestionable that defendant is under federal supervision. Defendant as well as the trustee, Dr. Brix (see his letter of March 16, 1929), have no reason to make application for a decision on the part of the Office of the Federal Superintendent

because they entertained the view that defendant is to be regarded as standing under federal supervision within the meaning of Art. 115 of the enforcement ordinance. This view is correct. Defendant is actually under supervision since his admission to the transaction of a life insurance business in Germany in 1904; defendant has still at the present time a main agent for Germany and maintains here an office; a trustee has been appointed. The Office of the Federal Superintendent for Private Insurance by letter of January 10, 1929 (II 14/69) has confirmed to defendant that defendant is not to be regarded as a concern not standing under federal supervision within the meaning of Art. 115 of the enforcement ordinance.

Under such circumstances—also in view of the decisions of the Office of the Federal Superintendent for Private Insurance in matters concerning the New York Life Insurance Company of New York issued after the holding of the terms held on October 25, 1923, and February 13, 1929, and in view of the grounds of such decisions—there can be no reasonable doubt that defendant is to be regarded as a concern standing under federal supervision within the meaning of Art. 115 of the enforcement ordinance. There is no reason why a decision should be rendered by the Supervision Office upon its own initiative and motion.

IV.

Plaintiff's claim, which is governed by German [284] law and which arose prior to February 14, 1924, and which bears on the payment of a definite

sum of money expressed in marks, is subject, therefore, to valorization as governed by Par. 59 and following paragraphs of the valorization law, and Articles 95–114 of the enforcement ordinance. No broader claim can be allowed. The proof offered and also the oath tendered are irrelevant and immaterial.

The court below has rightfully dismissed the action. The appeal is ungrounded and had to be dismissed.

The decision as to the costs rests on Par. 97 of the Code of Civil Procedure.

According to Par. 708 of the Code of Civil Procedure this judgment is to be declared provisionally enforceable pending appeal.

Signed: von Biegeleben. Riffel. Dr. Adelmann.

Published on April 15, 1929.

Signed: Glasl, Clerk of the Court.

These presents are to certify as to the agreement of the foregoing copy with the original.

Munich, April 25, 1929.

Office of the Clerk of the Court of Appeal.

Signed: Knecht, Councillor of Accountancy.

To Mr. Brinz, Counselor at law.

Fee: RM. 4.20

Entered under No. 119.

Collected on April 25, 1929.

The Office of the Clerk of the Court of Appeal of Munich, Accounting Division.

Signed: Schmidt. [285]

EXHIBIT "S."

VII. 339/29.

Pronounced on Februray 21, 1930.

(Sign) Merck, Inspector, as Clerk of the Court.

JUDGMENT.

of the VII Senate for Civil Cases
of the German Supreme Court
of February 21, 1930.

In the Name of the Empire.

In the Matter

of the Schutzverbandes fuer auslandsversicherte, e. V. (registered Association) in Munich, represented by its Chairman.

Plaintiff and Plaintiff in review,

Attorney of record: Attorney, Councillor Dr. Kurlbaum in Leipzig,

versus

The Schweizerische Lebensversicherungs und Rentenanstalt (Swiss Life Insurance and Annuity Institution), Mutual Insurance Association in Zurich represented by its president,

Defendant and Defendant in review,

Attorney of record: Attorney, Privy Councillor Dr. Junck in Leipzig,

The German Supreme Court, VII Senate for Civil Cases, composed of Justice of the Supreme

Court Schliewen as Presiding Judge, and the Justices of the Supreme Court Stoelzel, Dr. Freiesleben, Dr. Warneyer, Dr. Schwalb, upon the hearing of February 21, 1930, has pronounced the following judgment:

The further appeal taken from the judgment of the 2 Senate for Civil Cases of the Court of Appeals of Munich of April 15, 1929, is dismissed, with costs to the plaintiff in review. [286]

STATEMENT OF FACTS.

By order of the Imperial Chancellor of June 15, 1904, to the defendant was granted the permission for conducting the life insurance business within the territory of the German Empire, by virtue of § 86 of the Law concerning private insurance enterprises of May 12, 1901. Since that time it maintains a business establishment within the territory of the Empire, and has appointed a chief representative for Germany who has his domicile within the territory of the Empire.

Through insurance contract, dated December 16, 1918, Wilhelm Kurt Max Haessler in Munich was insured with the defendant, which was represented by its chief representative Dr. Ruf in Munich, against the payment of an amount of M. 20,000, for an annunity of M. 1,107.80, which was to become due first on December 11, 1919. The first annuities (for 1919, 1920, 1921, 1922) were paid. Afterwards defendant ceased to pay the annuity and referred Haessler to the revaluation fund located in Germany. On November 24, 1924, Dr. Hans

Brix was appointed by the Supervisory Office of the Empire for Private Insurance as Trustee for defendant (§ 12 of the 4th Ordinance containing regulations as to Art. I of the 3rd Tax Emergency Ordinance.) Haessler assigned his claims against defendant in September 1927 to plaintiff. Plaintiff, in the present action, demands a declaratory judgment to the effect that defendant is obligated—outside of the procedure as to revaluation under the Revaluation Law—to make good the deficiency as to and/or the difference respectively between the amount of the annuities resulting from the share of the policy involved herein in the German revaluation fund and the full gold value of the annuities having become due in the past and becoming due in the future.

The Landgericht (District Court), on May 22, 1928, has dismissed the complaint. The appeal taken by plaintiff was dismissed, on April 15, 1929, by the Court of Appeals. Plaintiff, in appealing for a review, is repeating the demand contained in the complaint. Defendant prays for dismissal of the appeal.

GROUNDS.

1. The Court of Appeals applies German law, holding that the parties, as it finds by consensus intended to subject themselves to the said law. It holds that such consensus appears from the following facts: that defendant has been admitted for conduct of business in Germany; that the contract has been made in Munich by the Chief Representative of defendant for Bavaria; that the sums to

be paid have been stipulated in German currency and have been paid in Munich; that the court of jurisdiction as to the German business establishment of defendant—of Munich—has jurisdiction as to actions arising from the said business operations in Germany; that, finally, neither in the application for insurance nor in the policy has been mentioned anywhere that Swiss law was to govern; and that such would have been the case, if the intention of the parties had been that the policy should be placed outside the realm of German law. [287]

As against this, it is asserted in the appeal that the Court of Appeals has wrongly taken into consideration merely the expressly declared intention of the parties as it has been expressed in the application for insurance and in the policy; that regard should have been taken also of the implicit intention, and that, in consequence thereof, the court below should have ordered that evidence should be taken in regard to the allegation of the plaintiff that, when the policy was made out, the intention had been on account of the political restlessness in Germany and the danger of a confiscation of property by the Communists, to place the policy outside of the realm of German law and to have Swiss law govern it. This objection, as far as reference is made to § 286 of the Civil Procedure Act for its support is without merit. The Court of Appeals has taken into consideration the said contention of plaintiff by stating that, if the parties had intended Swiss law to apply, such intention would have been expressed in the application for insurance or in the policy. It is true, it cannot be said that plaintiff

by contractual agreement has subjected himself to German law, because neither the policy nor the application contain any provisions as to the law to govern, and agreements not contained in the said documents would be not binding on the strength of § 3 of the terms and conditions of the insurance; but the implicit intention of the parties which, in the absence of an express agreement as to the law to be applied, governs (see Decisions of the Supreme Court in the Reports of the Decisions in Civil Cases, vol. 68, p. 205) shows that German law should govern, because such intention ordinarily appears from the fact already that the place of performance is situated in Germany (see Rep. of Dec. of the Supreme Court, vol. 53, p. 140). Place of performance by defendant was herein the place of the business office of its German business establishment.

2. The Court of Appeals has negatively answered the question as to whether the continuance of the value of the annuity has been guaranteed. It holds that, by the provision contained in the policy that the annuity was to be invariable, defendant intended merely to express that the annuity would be paid in the stipulated amount, without having regard to any profits accruing to the company; that the representative of defendant, Dr. Ruf, when mentioning that Haessler ought to invest his money in Switzerland in order to secure it against decline of currency or national bankruptcy in Germany and that the annuity would always and everywhere be paid in the identical amount, had intended thereby, as was also known to Haessler, not to guarantee the

continued value of the annuity, but only that Haessler would have an always solvent debtor. The Court of Appeals holds that the plainest evidence that continuance of value has not been agreed upon appears from the fact that Haessler has accepted, without objection, the annuities until 1922 in depreciated paper marks and that he has interposed his claim after years only.

The appeal, in the first place, takes objection to the construction of the policy by the Court of Appeals and contends that the words "the annuity is guaranteed and invariable" could be construed, in good faith, only as being of the meaning that defendant thereby has assumed the risk of depreciation of currency, and that at least Haessler had to conceive that sentence in the said sense.

The policy, as a typical provision of a contract, is subject to the discretionary construction on the part of this Court. [288] Such construction, however, leads to the conclusion reached by the Court of Appeals. The provision referred to supra regarding the annuity is adjoined in § 2 of the policy as a half sentence to the provision that the recipient of the annuity shall not have any claim to participation in a surplus resulting from the books and cannot be made liable to any such deficiency; it is thereby defined and limited. The parties could not think, in 1918, of a depreciation of money as it has occurred later on, and, as the Court of Appeals has found, they have not considered such an event; consequently as to depreciation of money defendant did not intend to assume any guarantee. The finding which the appeal contends is missing namely, that

the declaration of defendant has not been conceived by Haessler as bearing a guarantee as to the depreciation of money, has been made by the Court of Appeals in a legally proper way by stating that Haessler, in accepting without objection payment of the annuity in depreciated money, has demonstrated that an agreement as to the continuance of the value of the annuity has not been made; that it would be an inexplicable contradiction to the said action, if Haessler has been of the opinion that defendant, by virtue of the policy, had to make good for the disadvantages arising from the depreciation of money. The appeal, furthermore, raises the objection that the Court of Appeals has also wrongfully interpreted the statements of Dr. Ruf made to Haessler. This objection must be dismissed because it refers solely to a finding of fact. The appeal contends, then, that, in holding that Haessler had known that Dr. Ruf did not intend to guarantee the continuance of the value of the annuity, the Court of Appeals has violated the provision contained in § 286 Civil Procedure Act, because this finding was not based upon statements made during the hearings. This contention is amiss; obviously an inference made from the facts as established is involved herein, and the Court below was authorized to do so, even though none of the parties had made an allegation to that effect.

3. The Court below has held that defendant is to be regarded as an enterprise being under the supervision of the Empire within the meaning of Art. 115 of the Enforcement Ordinance of November 29, 1925, and that, consequently, Arts. 95–114 of

the Ordinance apply to claims resulting from a life insurance contract made with it. The appeal contends that the final determination of the question whether an enterprise is to be regarded as not being under the supervision of the Empire, is to be made by the Supervisory Office of the Empire for Private Insurance (§ 115 ibid.), so that the regular courts are not authorized to determine upon this question; that, therefore, the Court of Appeals should have caused the Supervisory Office of the Empire to make a determination in that respect. It is true, Art. 115, sentence 3, reads as follows: "as to the question whether an enterprise within the meaning of the present provision is to be regarded as not being under the supervision of the Empire, the Supervisory Office of the Empire for Private Insurance determines finally and conclusively," and it must be conceded that the interpretation as asserted by appellant, corresponds to this language ("whether" is to be regarded). However, in interpreting legal provisions, regard must be had also as to their purpose, and such consideration may lead to a change of the meaning resulting from the mere language. Through Art. 115 such foreign insurance enterprises as are under supervision of the Empire, shall be protected from claims to revaluation which might be raised by insured persons on the basis of the general [289] rules as to revaluation, contrary to the provisions contained in Art. 95 et seq. of the Ordinance. It shall be *avoided* that a foreign insurance enterprise which in the opinion of the Supervisory Office is under the supervision of the Empire, is treated by the regular

court as not being under supervision of the Empire, and consequently will lose the advantages as provided for in Art. 95 et seq. Art. 115, on the other hand, has not in view the protection of the insured persons, it does not intend to prevent that, without a previous determination of the Supervisory Office of the Empire, a foreign insurance enterprise is regarded by a regular court as being under the supervision of the Empire, and that, consequently, such claims as are based on general rules of revaluation are denied against such an enterprise. It follows therefrom that in sentence 3 of Art. 115 only the determination that a foreign insurance enterprise is to be regarded as not being under the supervision of the Empire, is conferred upon the Supervisory Office of the Empire, and that it is not necessary to ask the Supervisory Office for a determination by its Senate in every case where it is contested that a foreign enterprise is under the supervision of the Empire. The regular courts, therefore, are not prevented from making such a decision.

Also the form of the provision, apart from its purpose, contradicts the construction as made by appellant; it is inexplicable, when following appellant, why the negative form of the sentence containing the indirect question ("whether an enterprise * * * is to be regarded as not being under the supervision of the Empire") instead of the positive form (whether an enterprise is to be regarded as being under supervision of the Empire) has been chosen, while the present form of the pro-

visions is joined in a natural way to the conception as exposed supra.

The Court of Appeals, therefore, was authorized to regard the defendant as being under supervision of the Empire, and it is not apparent that any error in law has interfered in its determination.

4. The appeal has been dismissed upon the above grounds.

(Sign) Schliewen, Stoelzel, Dr. Freiesleben, Warneyer, Schwalb.

Certified to

(Sign) Merck,
Inspector,
As Clerk of the Court.

Amount involved in the proceedings in the Supreme Court R.M. 12,000. [290]

EXHIBIT "T."

24 U 5680/28 to 34

In the Matter Guardian

Life Insurance (Lebensversicherung)

vs.

Daunert.

ORDER.

Upon motion of defendant, the proceedings are suspended, pursuant to section 77 of the Revaluation Act of July 16, 1925, for the following grounds:

Plaintiff, upon interrogation by the Court, has contested that defendant is an insurance company under the supervision of the Empire. He, however, has not been able to contest, in particular:

(a) that defendant has been permitted to transact business in Germany, in accordance with section 85 et seq. of the Insurance Supervision Act;

(b) that it has actually commenced to transact such business in Germany and, up to the present time, has continued to do so;

(c) that is has appointed a chief agent for the German Empire;

From all these points it follows, without any further consideration, that defendant, in regard to its German life insurance business, is an insurance company being under the supervision of the Empire within the meaning of Article 115 of the Enforcement Ordinance of November 29, 1925, and that no final decision of the Federal Insurance Board relative thereof in accordance with the said Article is required. [291]

Plaintiff, therefore, cannot assert that his claim is governed by the general legal provisions applying thereto. He attempts to allege that the application for his life insurance, which is the basis of his claim for revaluation, has been made and accepted abroad and consequently does not partake of the nature of a German insurance case of defendant. But the insurance certificate shows that the application of plaintiff for insurance has been accepted in Berlin by the chief agent for Germany, and furthermore, section 3 of the General Terms for Insurance explicitly states that any application for insurance as authenticated through the policy shall be valid not until the chief agent of the company for Germany has affixed his signature thereto. To comply therewith, the chief agent for Germany,

Mr. Goese, in Berlin, subsequently has executed his signature under the policy. That, later, the policy has been handed and "made out" to plaintiff in Barcelona by the agent general of defendant, is of no consequence in regard to the execution of the contract, considering, also, that it is explicitly stated in the policy that agents "may not enter into contracts nor alter same" on behalf of the company. Thus, the life insurance contract of plaintiff actually is part of the German insurance cases of defendant, even though—as plaintiff tries to assert—no premium reserve nor a premium-reserve-fund in Germany should have been formed for his policy.

In view of these considerations it is not necessary to examine into the question prompted by plaintiff as to whether, within the purview of the Revaluation Act and the Enforcement Ordinance, in regard to domestic life insurance companies, notwithstanding the restriction of discretionary revaluation as provided for on principle, such restriction [292] according to the intention of the law, should be absent in the particular case where no security subjected to depreciation in Germany has been provided for the insurance concerned because in the present case a foreign company is involved, and for such a company the only legal exception as provided for in Article 115 of the Enforcement Ordinance does not take place.

Since, consequently revaluation of the life insurance claim of plaintiff cannot take place under the general legal provisions (discretionary revaluation), but solely by means of such proceedings as provided for through the Enforcement Ordinance, and

since it is just the amount of revaluation which is in dispute, the determination of the litigation depends upon this amount of revaluation, and therefore it was held to be proper, upon motion of defendant, to order the proceedings to be suspended.

Berlin, July 11, 1928.

Court of Appeals (Kammergericht).

Part 24 for Civil Cases.

(Sign) Pleuss, Dr. Biermann. Dr. Hirschfeld. [293]

EXHIBIT "U."

TRANSLATION

From German

24 U. 5680. 28/39

Published March 12, 1930.

Signed Schwartzkopf, Court Clerk.

In the Name of the People.

In the Matter of the

Guardian Life Insurance Company of America, represented by its main agent for Germany, the general manager for Europe, Mr. Goose, of Berlin W. 8, Behrenstrasse 8,

Defendant and plaintiff in appeal proceedings, represented by Dr. Walther von Simson of Berlin W.8, Unter den Linden 3a, or Counsel,

versus.

The merchant, Max Daunert of Barcelona, Oficina y Almacenes Calle Cortes 548,

Plaintiff and defendant in appeal proceedings, represented by the attorneys at law Dr. Hans Fritz Abraham and Dr. Gunther Loebinger II of Berlin W. 8, Friedrichstrasse 182, of Counsel,

For 4000 RM claim for revaluation of a life insurance, Part 24 in Civil Matters of the Court of Appeal in Berlin, pursuant to the hearing of February 26, 1930, the court being composed of Mr. Pleuss, presiding justice of the Special Division, and Dr. Biermann, of the Court of Appeal of Berlin, and Dr. Hirschfeld, Justice, has decreed:

The appeal of defendant from the judgment of Part 26 in Civil Matters of the Superior Court I of Berlin, published on February 14th, is denied.

The costs of the litigation are to be borne by the defendant. The decision is enforceable, provisionally, pending appeal.

FINDINGS.

Plaintiff, a citizen of the German Reich, has resided for a long time and even prior to 1907, in Barcelona. In accordance with policy No. 155665, which is worded in German, and which has been submitted, the defendant, which called itself the "Germania" at that time, insured his life in the year 1907 for the sum of 10,000 Marks. The contract was closed through the general agent of the defendant in Barcelona, who, in, accordance with the special remark on the policy, was not competent to close the insurance contract, but who "issued" the policy on April 26, 1907 in Barcelona and delivered it there to the plaintiff against [294]

payment of the first premium. The policy bears the facsimile signatures of the president and the secretary of the defendant and the remark: "Executed Berlin, April 23, 1907 Th. Liebendt, Controller; D. Rose, General Agent." D. Rose was at that time not only the general agent of defendant in Europe, but also main agent for Germany. With regard to other matters, reference is had to the cited contents of the policy.

In accordance with the policy, the insurance principal was payable on April 26, 1927 to plaintiff. Moreover, unquestionably in the years 1908 to 1922 a "bonus" of 876 Marks had been credited to him.

Up to the year 1923 plaintiff paid the agreed premiums in Marks to the defendant, defendant alleging that this was the case beginning with 1908 in Berlin, and plaintiff alleging that this occurred for several years, in Spain, and then, after the beginning of the war, in Berlin.

Plaintiff demands payment of the insurance sum plus bonus, revalorized in reichsmark; in accordance with his computation in the complaint, his claim for revaluation calls for 4000 RM. He alleges that for the revalorization of his claim, the revaluation law does not enter into question, but the unrestricted revaluation of the German Civil Code; for the reason that firstly, the defendant is not subject to government supervision in the sense of Art. 115 of the Enforcement Ordinance to the Revaluation Law and secondly that his policy did not belong to the German, but to the Spanish assets of defendant. That a revaluation in accordance with the Revaluation Law could not enter into question,

if for no other reason because a premium reserve fund had certainly not been formed for this insurance in Germany.

He has petitioned that defendant be sentenced to pay 4000 RM plus 7% interest as from May 1, 1927.

Defendant prayed for dismissal of the complaint. It alleges that suit could not be instituted against it, for the reason that plaintiff could only effect a revaluation of his claim by instituting suit against the trustee in the manner provided by the revaluation law and the enforcement ordinance. That plaintiff was not entitled to free revaluation in accordance with Art. 115 of the Enforcement Ordinance, as it was subject to Government Supervision. That it was true that no premium reserve fund had been established in Germany, but that that fact in no way affected the provisions of Art. 115 of the Enforcement Ordinance. That the policy had not been executed, as believed by plaintiff, in Spain, but had been executed through the main agent in Germany, as had also been provided in the terms. That it was subject to German law and that from this alone it followed that it belonged to the German assets of defendant; that only through an error in law had it set forth in the answer to the complaint that this contract had not been closed in Germany; that if at any former time, outside of the litigation, it had represented in letters to the plaintiff or to the Government Supervision Office, that this insurance did not belong to the German, but to the Spanish assets, it had been a mistake; that it was not material where and how it had been conducted, that it should have been conducted in the German

[295] assets, and that a premium reserve should have been formed in Germany.

The Superior Court, through judgment, the tenor of which is submitted, and to the cited contents of which reference is had, declared the complaint as basically founded.

Defendant appealed from this decision in due time and form, petitioning that, reversing the judgment, the action be dismissed; that in case sentence is pronounced against it, it be permitted to avert execution proceedings.

Plaintiff prayed for denial of the appeal. A cross appeal, of which he gave notice, was not served with his consent. Consequently, it was not the subject matter of the proceedings.

Defendant first of all moved before the court of second instance, to suspend the proceedings in accordance with Art. 77 of the Revaluation Law. This was opposed by plaintiff, who denied that the defendant was under government supervision, within the meaning of Art. 115.

The Court, by decision of July 11, 1928, stayed the proceedings, but upon motion of the plaintiff, rescinded this decision.

The parties pleaded in accordance with their briefs of the first and second instants. Reference is had thereto and to the contents of the documents submitted.

GROUNDS FOR THE DECISION.

The appeal, which is permissible in itself, could not be successful.

With regard to the fact that the insurance contractual relationship should be subject to German law, both parties are in basic agreement,—nor can this be doubted from the entire contents of the policy, whether the contract, as believed by plaintiff, was "closed" in Spain, or as alleged by the defendant, was closed through the execution of the policy in Germany.

The Court also accepts the principle that the defendant is subject to government supervision within the meaning of Art. 115 of the Enforcement Ordinance, as set forth in greater detail in the decision of the Court on July 11, 1928. Reference is had thereto.

Undoubtedly, no premium reserve and no premium reserve fund were formed for the policy of plaintiff in Germany. The Court shares basically the opinion of the Supreme Court in the decision of December 19, 1929 in the matter of Frensdorff vs. Schweizerische, that this question in itself would not be decisive for the question, whether the revaluation is to be effected in accordance with the revaluation law, or not. The question is, however, of basic importance, whether the insurance belongs to the German assets of the defendant or not. In case of doubt, one will have to assume that an insurance, subject to German law, particularly if it has been contracted in Germany, as alleged by the defendant here, must be considered [296] as belonging to the German assets. However, in individual cases, for very special reasons the exceptions might occur that such a policy as a matter of fact does not belong to the German assets and is

therefore not subject to Government Supervision within the meaning of Article 115 of the Enforcement Ordinance, in which connection it is then immaterial whether the main agent of the Defendant for Germany has violated his obligations with regard to the Supervision Office in any way, by not seeing to it that the Policy is taken up in the German assets. The Court encountered such an exceptional instance in the matter 2.U.10797.28 (Decision of March 5, 1930). A similar exception is constituted here. Not only was no premium reserve fund formed by the Policy was never taken up in the German assets and kept there. This, the defendant itself, communicated to the Government Supervision on December 29, 1927 by specifically stating that the Policy had been kept by it at the time in the Spanish assets. That it must concede that as a matter of fact that the insurance had never been kept in the German assets. The Government Supervision Office obviously did not take any objection to this statement and let the matter rest. On January 14, 1928 it advised the plaintiff's counsel that in accordance with the report of defendant the insurance in question had not been kept in the German insurance assets of Defendant. Why it acted so, the parties, and particularly, the Defendant, cannot explain any more. The persons entering into question had died in the meantime. The assumption, however, cannot easily be dismissed, that this was due originally to the fact that first of all the policy had not been executed at all by Rose in his capacity as main agent for Germany but as main agent for Europe and that secondly

the policy had been "issued" by the general agent in Barcelona and had been "redeemed" by plaintiff by payment of the first premium in Spain. Thus it was taken over in the Spanish assets but not in the German, and allowed to remain there. If the defendant proceeded in this manner, plaintiff cannot be told now that it should have proceeded differently. Plaintiff could then reply and call defendant's attention to the conditions which the defendant itself established with regard to the plaintiff. Plaintiff accordingly cannot be referred by defendant in this exceptional case to Trustee proceedings. Plaintiff has a claim for unrestricted revaluation with regard to the principles of good faith and morals within the meaning of Article 242 of the German Civil Code. The decision of the Superior Court is therefore correct without legal points which the parties have touched upon in the litigation. All ancillary decisions are based on article 97, 708, 713 of the Code of Civil Procedure.

Signed: Pleuss Dr. Biermann Dr. Hirschfeld.

Issued.

Berlin, March 18, 1930.

(L. S.) Wagner—Court Clerk.

Of the Court of Appeals of Berlin. [297]

EXHIBIT "V."

In the Name of the People.

VII. 79/1929.

Pronounced the 20th December, 1929.

Signed: Merck, Inspector of the Government, Clerk of the office.

In the Case of

Otto Hecht at Wildenroth, Bavaria,

Plaintiff and appellant,

Attorney: Justizrat Dr. Kaiser in Leipsig,

versus

The New York Life Insurance Company in New York, represented by its authorized agent for Germany, Julius Kahn in Frankfurtam Main, Schumannstrasse 45,

Defendant and Appellee.

Attorney: Dr. Benkard in Leipzig,

The Supreme Court, Seventh Civil Senate, consisting of Mentzel, President of the Senate, Schliewen, Dr. Freiesleben, Dr. Warneyer, Dr. Schwalb, Judges of the Supreme Court, in pursuance to the pleadings of the 20th December, 1929, has pronounced the following judgment:

"The appeal against the judgment of the 18th December, 1928, of the First Civil Senate of the Court of Appeal of Darmstadt is dismissed. The appellant is charged with the costs of this revision."

FACTS.

In 1904, plaintiff insured his life with the defendant company for an amount of 10000 Mrk in witness whereof the policy of insurance No. 1,548,016 was executed under the date of the 24th May, 1904. The contract should continue until the 24th May, 1929. During the German inflation, the defendant company intended to transfer almost its whole German business of insurance, amongst it the policy of the present plaintiff, to a recently founded insurance company, called "The Kronos." Plaintiff did not give his assent. The German Insurance Board at Berlin, by a decree of the Senate of the 5th April, 1922, authorized the transfer of the German contracts of the defendant to the Kronos Company. In a letter of the 15th February, 1923, addressed to plaintiff, the Board expressed his opinion that the defendant company would not wholly released thereby from its obligation against, insofar as the Kronos company would not duly fulfill the obligations of the defendant company, the insured who had not given their assent to the transfer of their contracts to the Kronos, could claim fulfillment from the defendant company. [298]

Plaintiff informed Defendant on this opinion, the 6th June, 1923, in the following manner:

> "In pursuance to my complaint, the insurance Board informed me, that the Senate has decided to allow the transfer of your business to the Kronos, but that the insured who preferred to remain in relation with the New

York, could do so. As I do not agree with the transfer of my contract, I beg to avail myself of this power and shall claim, as hitherto, fulfilment of your obligations. The premium will be paid to you under this condition."

Plaintiff however paid neither the premium thus announced, nor a premium which became due later on. All that can *been* seen is, that the last premium was paid in 1922. By his suit of the 11th September, 1924, plaintiff claimed judgment, in a former suit, declaring:

1. That his life insurance contract with the defendant company did still legally exist and that therefore the rights and obligations resulting from this contract did exist between the parties to the contract;
2. That the surrender value of the policy claim did equal at least the surrender value of the 1st July, 1915.

By the judgment of the 21st May, 1926, of the Court of Appeal of Darmstadt, the first of these two claims was allowed, the second dismissed.

By the present suit plaintiff claims judgment condemning defendant:

1. To give him information on the conditions under which at present policy loans are being granted;
2. To grant him a loan of RMk. 2730.—under the conditions prevailing at the time of granting.

Plaintiff is of opinion that he is, according to the stipulations of the policy, entitled to a loan of at least double the amount. An auxiliary claim, based

on an alleged notice, served to take effect on the 24th May, 1927, was not maintained before the Court of Appeal, plaintiff having convinced himself that the notice was of no effect. Defendant has asked to dismiss the claim, and to declare, pursuant to its counterclaim, that plaintiff is not entitled, besides the loan of 2730 RMk. demanded by his suit to another loan of an equal amount. The County Court has dismissed the claim, and allowed the counterclaim. The Court of Appeal rejected plaintiff's appeal. Plaintiff's further appeal claims: first that the judgment of the Court of Appeal should be reversed and judgment given for him according to his motions before the Court of Appeal; eventually that the judgment of the Court of Appeal should be reversed, the suit declared settled, and defendant charged with costs. Defendant has asked to dismiss the appeal. The facts have been pleaded according to the judgments of the courts below. [299]

REASONS.

The Appeal must be Dismissed.

It first relies on the objection of estoppel by record, which was so far not raised by defendant. By the judgment in the former suit was, it is true, declared that the insurance contract did still exist between the parties and that the rights and duties resulting from the contract did exist between the parties to the contract, but the individual rights and duties were not established. By this judgment a motion of the plaintiff that his particular rights should be established, was dismissed. It only re-

mains to establish the rights and duties of the parties according to the contract which was executed. That is what the Court of Appeal has done.

Its results are objected to by this appeal. It refers to the clause of the "Special conditions" reading as follows:

> "If the premiums for three full years are paid, the company will grant loans as an advance on the value of this policy."

Plaintiff is of opinion that the claim of the insured with regard to loans is not terminated by the stipulations with regard to the forfeiture of the policy. But these read as follows:

> that the policy will not be forfeited after it had become effective one full year, that the policy, if one of the subsequent premiums will remain unpaid:
>
> a. will be converted, upon request on the part of the insured, into a policy requiring no further premiums, or
>
> b. without such request of the insured, will be extended for a certain time, for the amount of M.10000.—
>
> that the contracts under a. and b. will remain subject to the provisions of the present policy, but without further payment of premiums, without being entitled to loans, and without share of the profits.

The Court of Appeals declared that the last proviso should govern, plaintiff having paid no premiums since 1922.

Plaintiff pointed out that it was not established, not even asserted, that defendant had demanded

further payment of premium; on the contrary, defendant had demanded that plaintiff should join the Kronos Company; that were the only request of the defendant which plaintiff had declined. It makes no difference, however, whether defendant has demanded the payment of the premiums or not. The provisions of the Act relating to contracts of Insurance, mainly § 39 of this Act, do not yet apply to this contract, as the appellee rightly pointed out. This objection, however, does not fully do away with appellant's opinion. This opinion attempted to establish that defendant did refuse to accept the premium. Appellant's opinion that plaintiff, if the defendant had refused to accept payment, must be treated as if he had paid, can not be supported. Effective payment can be [300] substituted only if the debtor, as soon as the creditor did not accept payment, deposits the amounts due and waives expressly his right to withdraw them, § 378 Civil Code. Plaintiff did not allege such deposit. But he is of opinion that he is entitled to object to defendant bad faith. Since defendant did not accept the premium, he should not be allowed to derive any rights from the non-payment. It needs no decisions whether this conclusion is right or not; according to the legal declaration of the Court of Appeal defendant did not refuse to accept payment. Having declared, in the correspondence, that the contractual relations of the parties were terminated by the contract between defendant and the Kronos, defendant had declared, in the meaning of § 295 Civil Code, that they would not accept the premium. Afterwards, plaintiff was not required to make a

tender in fact; it would have been sufficient for him to make a tender by word. Plaintiff however made neither a tender in fact, nor a tender by word. A tender in fact was not asserted before the courts below; this assertion which was not made until before this court, cannot be accepted here. The letter of the 6th June, 1923, which by appellant is interpreted as containing a tender by word, was construed by the Court of Appeal as merely announcing a tender in fact. This construction cannot be legally objected to nor can it the conclusion drawn from this construction by the Court of Appeal, that defendant was not obligated to answer the letter of the 6th June, 1923 and was entitled to wait whether the premium should be paid in fact. The silence on the part of the defendant company after the letter of the 6th June cannot be construed as a refusal to accept the premium tendered to the defendant company.

Appellant is of opinion that this construction did contradict the facts established by the County Court; "that plaintiff paid his premiums from 1904 to 1921, but afterwards, obviously in pursuance to a refusal on the part of the defendant to accept them, did not pay the subsequent premiums." But now facts can be established before the Court of Appeal which is therefore in a position to establish a state of facts different from the one established before the County Court.

The objection of bad faith is therefore not supported by a refusal of the defendant to accept the premiums. But it is no more supported by the principles which was repeatedly recognized by this

Court, that a party which did not fulfill its obligations, cannot assert want of fulfillment on the part of the other party. Defendant has now fulfilled its obligations. Informed by the results of the former suit, it did no more assert that the contract did exist, and objected only that the rights resulting from this contract were in the meantime affected by the attitude of plaintiff himself. That means no bad faith, plaintiff being in a position of preserving his former rights by appropriate proceedings, tender, and, eventually, deposit of the premiums.

With regard to the development of his contract, plaintiff has, since 1923, no claim for loans, and is therefore not entitled to demand informations, having regard to this result the auxiliary claim before this Court is not founded. This auxiliary claim is based on the opinion that plaintiff had the right for loans until the 24th May, 1929, that is until the expiration of the policy. This opinion being erroneous, the date of the 24th May, 1929, did not affect the rights of the plaintiff and did not settle his claim for loans.

The appeal must therefore be dismissed.

Signed: Mentsel Schliewen Dr. Freiesleben Warneyer Schall.

(Seal)

[301]

EXHIBIT "W."

4. U. 10 152. 29/11.

Pronounced the 5th of February, 1930.

(Sgd.) Schwartzkopf, Justizinspektor, as Clerk of the Court.

In The Name of the People.

In the Case of

Waldemar Steffen, Merchant, of 27, Erodschrangen, Hamburg,

Plaintiff and Appellant,

Counsel: Dr. Carl Horn and E. G. Wegener, Attorneys at Law, of 27 Kleistrasse, Berlin W. 62,

versus

The New York Life Insurance Company (mutual insurance company) of 346 Broadway, New York, (having its) *Chef* establishment in Germany at Frankfort on-the-Main, 45 Schumannstrasse, represented by its Chief Agent for Germany,

Defendant and Appellee,

Counsel: Dr. Walther von Simson, Attorney at Law, of 3a Unter den Linden, Berlin,

Concerning a claim based on a life insurance policy (value at issue: 17 000 Reichsmarks).

The 24th Senate for Civil Cases of the Court of Appeal of Berlin, consisting of: the President of the Senate Pleuss, the Councillor of the Court of Appeal Dr. Biermann and the Councillor of the Dis-

trict Court Dr. Hirschfeld, (acting) upon the pleadings held on January 22, 1930, have decided:

The appeal of the Plaintiff against the Judgment pronounced by the 30th Chamber for Civil Cases of the District Court (Landgericht I Berlin) of Berlin on the 10th of June, 1929, is dismissed. The Appellant is ordered to pay the costs of the appeal. [302]

This Decision is provisionally executory; the Plaintiff is, however, allowed to waive the execution by giving security for an amount of eight hundred Reichsmarks.

FACTS OF THE CASE.

According to the Policy issued in Hamburg on March 5, 1903, which has ben produced to the Court of Appeal and to the contents of which reference is made herein, the Defendant had insured the Plaintiff's life for a period of twenty years, beginning from March 2, 1903, the sum insured being 50 000 German Marks. As appears from a notice on the first page of the Policy, this insurance is a so-called "mixed" insurance for twenty years and provides for return of premiums during twenty years and for a twenty years dividend accumulation period. The "Special Conditions" provide for the following "kinds of settlement at the end of the dividend accumulation period":

> "The present Policy provides for the accumulation of dividends during a period of twenty years, ending on March 2, 1923. If the insured is alive on said day at noon and has fully paid all premiums which have ever fallen due,

the Company will allocate the profit (accrued) to the insured or to his legal successors, and at the same time the Policy will be redeemed against payment of its total value, this redemption being made (at the option of the policy-holder) in one of the three following ways:

(1) either against payment in cash; or

(2) in the shape of life annuities; or

(3) by conversion into a premium free insurance, not sharing in the profits and becoming payable only upon the death of the insured. In this latter case however, the insured, if he wants to enjoy such privilege, has to give to the Company sufficient evidence that his conditions answer the requirements made for the issuance of such insurance."

In his proposal (for an insurance) the Plaintiff had signed *inter alia* the following declaration, an abstract of which is reproduced in the Policy:

"I agree with the share of profits falling to the Policy to be issued upon this proposal being fixed in accordance with the principles and methods adopted by the Company for the respective distribution, and I agree in advance with such way of determining the share of profits, both on my own behalf and for and on behalf of any other person who may have or claim an interest therein under the proposed policy."

The Plaintiff has paid during twenty years the annual premiums stipulated in the contract. [303]

In the year 1922 the Defendant transferred the main part of her German insurance stock to the "Kronos," a life insurance company created for this purpose. The Plaintiff, as is undisputed, has not given his express consent to said transfer. The parties—as they have declared upon being questioned by the Judge—are agreed that said transfer is inoperative as against the Plaintiff and that the Plaintiff is not bound to recognize this transfer as operative against himself; furthermore, (the parties agree) that the negotiations conducted and conventions arrived at between the Plaintiff and "Kronos" shall be binding for and against the Defendant.

At the end of February "Kronos" asked the Plaintiff what method of settlement he wished to choose at the end of the accumulation period. Thereupon letters were exchanged between "Kronos" and the Plaintiff, dated March 1, 12, 13, 14 and 26, 1923, of which partly undisputed copies and partly authenticated originals have been produced to the Court and to the contents of which reference is made. "Kronos" informed the Plaintiff that the premium-free insurance would amount to 119 950 Marks, the "total cash value," however, would amount to 50 000 Marks, and, plus 16 606 accumulation dividend, to a total of 66 606 Marks. The Plaintiff chose the premium-free insurance. He confirmed this on March 26, 1923, and thereupon delivered the Policy to "Kronos," which latter returned it to him with the following notice:

> "This policy having ended its dividend accumulation period on March 2, 1923, and the third

method of redemption having been chosen in accordance with its terms, it is hereby converted into a premium-free Policy covering an amount insured of 119 950 Marks (One hundred nineteen thousand nine hundred and fifty German Marks), without participation in the profits. The premium-free Policy is subject to the conditions of the original policy, excepting only the payment of premiums and the above-said modification.

Berlin, this 19th day of April, 1923,—Kronos."

The Plaintiff has in no ways objected to this notice.

It is undisputed and also known to the Court that, according to a Decision of the (First) Senate and of the Senate of Appeal of the (German) Insurance Department, the Defendant is supervised by said Insurance Department. The Insurance Department has also appointed a Trustee (for the Defendant). For the sum insured of 50000 Marks a premium reserve fund had undisputedly been constituted in Germany, which (premium reserve fund) was and is subject to the supervision by the Insurance Department and participates in the revaluation procedure to be carried through by the Trustee.

The Plaintiff has brought in an action asking for the Defendant being ordered to pay (to the Plaintiff) 13 285 Reichsmarks, plus 6% interest thereon since January 1, 1925. [304]

According to his Claim filed in the First Instance he has asserted (1) that he claims from the Defendant payment of the accumulation dividend really due to him; (2) that this claim is a claim of valua-

tion; (3) that it means that the insured shall receive in gold value what is due to him as his share in the accumulation dividend falling to his group (of the Defendant's policies); (4) that, according to the communications made by the Defendant, said accumulation dividend has had a "nominal value of 16 606 M"; (5) that, taking into account his having paid part of the premiums in the last years of the accumulation period in depreciated money, he claims the amount sued for "as equivalent of such accumulation dividend"; (6) That this claim is in no way affected by the conversion of the Policy into a premium-free insurance, but that it has to be considered in just the same way as if the Defendant of "Kronos" had paid to the Plaintiff the dividends accrued in Papermarks; (7) that such a partial payment would have to be applied to the Plaintiff's claim only up to its Gold Mark value, so that the balance would still have to be paid to him; (8) that in the present case the converted Papermarks had merely had a value of
some 5 Goldmarks.—Eventually only the claim is based also on the main claim (payment of the principal sum insured). In this latter respect, however, the Plaintiff has produced no reasons nor explanations whatever.

The Defendant had contested the claim and had asked for the case being dismissed.

(The Defendant contends) As it is undisputed that it is supervised (standing under supervision by the Insurance Department) in the meaning of Art. 115 of the Executory Decree and as the "Treuhanderverfahren" (revaluation procedure to be carried

through by the Trustee) has been instituted and applies especially also to this Policy, the Plaintiff's claim can only be a revaluation claim in the sense of the (German) Revaluation Act, because already the original Policy of March 5, 1903, had merely been a pure Mark-Policy, this being true both as regards the principal amount insured and the accumulation dividend which had to be calculated in Marks on the basis of a certain standard to be fixed by the Defendant for the respective Group under the methods and principles adopted by the Defendant and binding for the Plaintiff, this accumulation (just like the principal sum) representing merely a claim based on the policy.

The new premium-free insurance, however, (says the Defendant) is without further ado a uniform Paper Marks insurance, which the Plaintiff has approved of. Claims for (free) revaluation outside the procedure provided for by the Revaluation Act are, therefore quite out of the question; insofar as the Plaintiff asserts such claims, his suit has to be dismissed; lawful revaluation claims, however, could be asserted by him only against the Trustee.

The District Court (Court of First Instance) has dismissed the claim by the Judgment mentioned in the tenor of this Decision, to the facts and motives of which Judgment reference is being made. [305]

The Plaintiff has brought in an appeal against this Judgment within the time and in the form prescribed for by the laws of procedure, and has applied for the decision being amended in accordance with his application (made in the First Instance);

in the event of dismissal of his appeal, however, to be allowed to waive the execution.

He had further made the following auxiliary application: to state that in the event of the additional insurance, dated from April 19, 1923, becoming payable (at his death), the Defendant is bound to pay to the wife of the Plaintiff Olga Steffen nee Hoffmeister, or—in case of her being deceased—to his (the Plaintiff's) lawful heirs, the amount of 23 900 Reichsmarks as sum insured based on the additional policy, insofar as this additional policies had originated from the accumulation dividends.

The Defendant had asked for the appeal being rejected. Both parties have repeated their allegations made before the Court of First Instance and have pleaded the case in accordance with the briefs filed by them in the two Instances, that is to say the Plaintiff by his briefs of February 22, 1929, October 10, 1929, January 16 and 21, 1930; the Defendant in accordance with the briefs, dated March 15, 1929, and January 10, 1930. To the contents of these briefs reference is being made.

The Defendant has agreed with the statement of claim being amended as set forth in the auxiliary application.

In support of his view that the claim for the payment of the accumulation dividend is not to be considered as "claim based on an insurance policy" in the meaning of the Revaluation Act the Plaintiff relies on the Decision pronounced by the present (deciding) Senate on July 10, 1929, in the case Gross versus New York (24.U5118/27). In reply thereto the Defendant stated that an appeal,

founded on weighty arguments, has been made against this Decision and that it will be re-examined by the Supreme Court. The Defendant stated that it could not recognize the view of the Senate to be correct. But (as the Defendant states) this point can be left open, because in specie the principal claim for payment of the sum insured must miscarry already on account of the fact that the Plaintiff, exerting his right of option in March 1923, had in principle renounced to cash payment and had chosen the premium-free insurance providing for payment upon his death, whereupon the parties had concluded such new contract in accordance with the provisions of the original policy; the auxiliary motion, however, must be objected to, first, under Art. 256 of the German Civil Procedure Act (Zivilprozessordnung), because a legal interest of the Plaintiff in the statement demanded by him is not apparent, and, second, because the insurance of April 19, 1923, quite obviously is merely a Paper Mark policy covering a fixed sum expressed in Papermarks, which can only fall under the Revaluation Act and be handled in the "Treuhanderverfahren," so that this claim against the Defendant has to be dismissed without further ado. In opposition to the Plaintiff's view, who tries to expose that this new [306] insurance of April 19, 1923, is utterly worthless, the Defendant points out that the total premium reserve fund constituted for the Policy of March 5, 1903, is placed at the disposal of the Trustee for the revaluation to be carried through in the "Treuhanderverfahren."

MOTIVES OF THE DECISION.

The parties are agreed upon, and both form and contents of the Policy show without the least doubt, that the contractual relations of the parties in this present case are to be judged exclusively under German Law.

The appeal which was in itself admissible, could not meet with success.

It is to be stated beforehand that in the second instance the Plaintiff has not expressly repeated his hint, made in the first instance, that the claim is eventually based also on the principal claim (for payment of the total amount insured). Already in the first instance the Plaintiff had stated nothing whatever in explanation or support of this point. As the Defendant is doubtless supervised, and as also for this policy there existed a premium reserve fund which, under Para. 10 of the Executory Decree of the Insurance Department (Ausf. Ges. des R. A. A.), dated August 6, 1926, (published in the Official Publications of the Insurance Department for 1927, pages 98 sequ.), for the rest is applied also to the (revaluation of) the premium-free insurance of April 19, 1923, there can be no doubt that under Art. 115 of the Executory Decree only the revaluation procedure provided for in the German Revaluation Act and (Durchfuhrungsverordnung) Executory Decree can take place as regards the sum insured, so that the claim against the Defendant extending beyond that, would in any case be unfounded. That the auxiliary motion does

not at all aim at a revaluation of the sum insured appears from its form and contents.

Therefore it can merely deal with the accumulation dividends. The Plaintiff in this connection takes the view that this claim is not a claim based on a policy in the meaning of the Revaluation Act at all, but that it is a claim based on a "Tontinenvertrag." He asserts that the accumulated assets of his group in March, 1923, had formed a special capital in which he had shared in the same way as every other member of said group and that he ought to have been treated in just the same way as said other members of the Group, regardless of the fact in what money (currency) his policy had been expressed. He asserts that the claim is really a claim of valuation existing besides the exact insurance, which had not been sufficiently taken into account in the negotiations and conventions of March 1923. Indeed the Claim of the Plaintiff would depend on the correctness of this standpoint supported in this way or some similar way. Because if the view of the Defendant is correct that the accumulation dividend claim also is merely a claim based on the insurance policy and that, in accordance with the binding methods and principles of the Defendant, this claim corresponding to the amount [307] insured expressed in Marks, could also only be expressed and determined in Marks, and had so been expressed and determined, then what was said hereabove with regard to the revaluation of the sum insured would without further ado be true also for the accumulation dividend and the claim of the Plaintiff—the principal claim for pay-

ment or the auxiliary claim for establishment—would without further ado be annulled. The Plaintiff believes to be able to rely in this connection on the Decision of this present Senate of July 10, 1929. There the Senate, upon thorough examination of the grounds (taking evidence etc.) has indeed assumed the claim to be one based on a tontine-insurance, which had indeed been inserted into the policy but could not by any means considered to be a claim based on a life insurance policy in the sense of Para. 59 of the Revaluation Act; that, more particularly, there could be no question of it being a claim for restitution of overpaid premiums, as might be the case with an insurance with current premium dividends; that according to the principles of good faith the defendant could also not rely on her methods and principles the application of which would (in specie) lead ever again to the establishment of a valuless *pro mille* rate of the utterly depreciated Paper Marks sum insured. This Decision and this argumentation are, however, in no way binding for the present litigation. (This Decision is not yet final; the argumentation (of the Senate) has still to be reconsidered by the Supreme Court; the Defendant has opposed them there and here with arguments which cannot be rejected without further ado and which perhaps may make necessary a renewed re-examination and even perhaps a renewed taking of evidence. The Senate therefore does not rely in (specie) the present litigation on his argumentation and statements made in the case of Gross versus New York; on the contrary he leaves open the decision regarding this question

which indeed is fundamental for the claim, as the claim has to be dismissed both as regards the principal and the auxiliary claims made, and this for other reasons which are quite beyond doubt.)

Under the policy of March 5, 1903, the Plaintiff had a triple right of option as regards the method of settlement to be chosen at the end of the dividend accumulation period. He has availed himself of this right of option after careful considerations, as appears from his correspondence with "Kronos." He has declined the cash payment proposed in the first line in the (said conditions of the) Policy, and has chosen the premium-free insurance for the case of death, after he had inquired about the height of the new sum insured and after he had also received the information of March 13, 1923, concerning the computation of the accumulation dividend amount with regard to which he had had some doubts. By choosing this method of settlement, the Plaintiff has renounced the cash payment and this both as regards the principal sum insured and the accumulation dividends. Even if the Plaintiff's idea concerning the true character of the Accumulation dividend were correct, and if then, in the case of his having chosen the cash payment, the payment of the Paper Marks amount computed by the Defendant had represented but an insignificant partial amount of the (Wertenteil) (amount of value) due to the plaintiff, he would not be able any more to assert his claim to such difference payment, just because, in availing himself of his right of [308] option, he had in principle chosen not the (proposed) cash payment but another method

of redemption. For these considerations the statement of the Plaintiff that the situation has to be judged as if he had received the 16 606 Papermarks on April 19, 1923, misses the point. It appears that the Plaintiff himself has felt this (lack of foundation of his claim) and has therefore made his auxiliary application. The Senate has serious doubts whether the claim for establishment ("Feststellungsklage") as such is admissible (in specie). Because, after all, what is at stake here is not at all the final establishment of the existence of *non*-non-existence of a legal affair, for which case alone Art. 256 of the German Civil Procedure Act admits such "suit for establishment"—(leaving apart cases concerning the acknowledgment of documents and/or the establishment of the spuriousness of documents, which do not interest here). It is merely a question of anticipating a motive (of decision) which nevertheless would not be binding for the Court in the event of a litigation instituted in future when the insurance becomes due (upon the death of the insured). The establishment aimed at by the Plaintiff further is directed to a fixed sum of Reic*h*smarks, but in the short calculation produced by the Plaintiff nothing is contained to show why the "Wertenteil" participation of the Plaintiff in the accumulation dividend of his Group—always considered to exist from the standpoint of the Plaintiff only—should amount to just 23 900 Marks. For ascertaining the real share (Wertenteil) of the individual insured of a Group a very precise exposition of the situation of the Group and of the total value of the dividends accumulated within and for

it would be required just from the standpoint of the Plaintiff. It will hardly be possible for the Plaintiff to give such precise statement without the exact data (vouchers etc.) to be produced by the Defendant.

As the Defendant has rightly stated, the auxiliary claim fails, however, without further ado, because in fact a new insurance with a fixed insurable amount expressed in Marks has been concluded on the basis of the old contractual relations, and this new insurance has come into existence and become valid in April 1923. It is beyond all doubts that all the suppositions of Para. 59 of the German Revaluation Act are given as regards this new insurance and that, therefore, it falls to its total extent under the revaluation Act and its Durchfuhrungsverordnung (Executory Decree). There can be no doubt that Article 115 of the Durchfuhrungsverordnung applies here to its full extent. Solely the "Treuhanderverfahren" has to take its place. There does not exist any claim against the Defendant beyond that (falling under said procedure). For this reason the auxiliary application of the Plaintiff had to be rejected. In this connection it may be stated that the Plaintiff's view that there does not exist any premium reserve fund worth speaking of for the new insurance of April 1923, cannot be shared. The Executory Decree issued by the Insurance Department, cited hereinbefore by the Defendant, provides just that in such case the premium reserve fund of the old insurance has to be applied to the new one.

Another question indeed is that [309] whether and what means may be placed at the disposal of the Trustee for the "revalorization" of the accumulation dividend, if indeed the view of the Plaintiff concerning the true character of the accumulation dividend were correct. But this question may be left open, because the claim had to be rejected for the reasons set forth hereabove.

For this same reason it is not necessary to enter into the Plaintiff's reference to the Decision of the Supreme Court of October 13, 1929 (published in the "Juristische Wochenschrift, 1929, page 3488); it may, however, be pointed out that this Decision obviously deals with a case and relations widely differing from those forming the object of this litigation.

Accordingly the main claim had to be decided, as it has been done. The secondary decisions (with regard to costs &c) result from Articles 97, 708, 713 of the Civil Procedure Act.

(Sgd.) Pleuss. Dr. Biermann. Dr. Hirschfeld. [310]

EXHIBIT "X."

Translation from German.

B/RK.

62.0.665/28.

Published on December 10, 1929.

Signed: Thiede, as Court Clerk and Recording Official.

In the Name of the People.

In the Matter of

The Merchant C. G. Bennholdt-Thomsen, Hamburg, Langemuehren 9, plaintiff.

Counsel: Attorney at Law Dr. W. Kuehn, Berlin, W. 50, Tauentzienstrasse 3.

vs.

The New York Life Insurance Company of New York, a mutual insurance company, Broadway 346, Main office in Germany, Frankfurt a/M., Schumannstrasse 45, represented by its main agent for Germany, defendant.

Counsel: The Attorneys at Law Dr. v. Simson, Dr. Wolff, Dr. v. Werner and A. Wehl in Berlin, W.8, Unter/den Linden 3a.

For claims arising out of an insurance contract.

Part 30 for Civil Matters of the Superior Court I in Berlin at the hearing of November 26, 1929.

The court consisting of the presiding justice of the Superior Court Dr. Kern, Justice Landsberg and Assistant Justice Dr. Thomsen, has decreed:

The complaint of the plaintiff is dismissed and the costs of the proceedings are assessed against him.

FINDINGS OF FACT.

Plaintiff insured his life with defendant in the amount of 10,000 Marks against 20 years premium payments and *accuulation* of the profit dividend for a like period of time on August 12, 1899 starting from August 2, 1899.

The accumulation dividend computed by defendant in accordance with its methods, in the amount of 2903.60 Marks, was paid out to the insured on August 5, 1919.

Plaintiff now demands from defendant the payment [311] of the actual value of the accumulated dividend taking as a basis the payment made by defendant and deducting from the amount of the payment the gold value computed in accordance with the table attached to the revalorization law. He alleges that the German insured, like the insured of other countries of the defendant had a claim to receive the full gold value of the accumulated dividend out of the accumulation fund of defendant, inasmuch as the accumulation fund had been established jointly (uniformly) for all insured of defendant under like insurances, in dollar values, as claimed to appear from the opinion of October 22, 1928 of Dr. Kamman rendered in the matter of Gross vs. New York 24 U 5118.27;

That when evaluating the claim there only had to be taken into consideration the fact that the in-

sured had paid a small part of the premiums in depreciated currency;

That in accordance with the accumulation dividend had to be newly determined in the manner that the per mille rate actually allotted to the respective insurance group be reduced on basis of the ratio which the amount of the dollar premiums paid, established on basis of the Berlin Stock quotation bears to the standard premium amount as stated by Privy Councillor Dr. Kamman in his second opinion rendered in the matter Gross vs. New York;

That on basis of such computation there resulted for the year 1919 a rate of 100.34% which, for simplicity's sake is reduced in this connection to 100%;

That inasmuch as the accumulated dividends in this case amount to a total of 2903.60 Marks and after deducting the gold value of the payment received there still existed a claim for the payment of 2239.45 Marks;

That secondarily plaintiff rested his claim also on the main claim.

Plaintiff finally prayed the court:

To adjudge defendant to pay to the Plaintiff 2225 Marks plus 6% interest as from January 1, 1925 and to declare the judgment provisionally enforceable pending appeal if necessary against the giving of a surety bond of a leading bank or of the Hermes-Kreditversicherungsbank A. G.

The defendant submitted the following prayer:

To dismiss the action with award of costs but

in case of a judgment being rendered against defendant, to permit the latter to stay execution proceedings by the giving of a surety bond.

Defendant submitted the following:

That plaintiff had not actually participated in a gold profit made by defendant;

That as in connection with all insurance companies also in its case there did not exist an actual percentage participation in a profit ascertained pursuant to business principles. [312]

That there were rather solely applicable the methods laid down it its business plan which methods were not in conflict with the principles of good faith and morals and to which the insured had agreed; that in accordance with this the profit participation mainly consisted in the granting of a certain premium rebate or discount in the form of a definite per mille rate of the main insurance amount; that inasmuch as the dividend computed in accordance with these methods had been paid to the insured the only question which might possibly arise was whether and in what manner such amount was subject to a possible revalorization;

That in connection with the claim for the payment of the profit dividend there was concerned a claim arising out of a life insurance contract inasmuch as the contract had been executed in the form of a single and homogeneous contract and therefore could only be judged as a single and homogeneous contract;

That there could not be any talk in this connection of a special gaming or betting contract par-

ticularly as no action could be instituted on basis of a gaming or betting contract; that inasmuch as furthermore there was concerned here a life insurance contract entered into prior to February 14, 1924, and as there were concerned definite claims affected by the depreciation of the currency and as it, defendant, was under Federal Government Supervision,—the revaluation was governed by the provisions of the Revalorization Law Par. 59 and following paragraphs;

That the claim therefore would have to be filed against its Trustee in the so-called Trustee Proceedings pursuant to the provisions of the Revalorization Law;

That even if one should assume an unlimited Revalorization in accordance with Par. 242 of the German Civil Code no higher amount could be awarded than the amount resulting from a revaluation in accordance with the provisions of the Revalorization Law;

That due to the unfavorable business results it had not been able to make any profit in Germany; that all income had remained here in Germany and on account of this had fallen victim to the depreciation of the currency; that the profits made by it in other countries had been allotted in full to the insured there;

That no further means were available in this connection the more so as a profit distribution, after it had once been made, could not be recalled in connection with the foreign insured;

That therefore there had been no unjustified enrichment on its part;

That in particular there could not apply in this connection a revalorization obligation in accordance with the principles of good faith and morals inasmuch as the payment had been made at a time when the marks still possessed 25% of its gold value. [313]

That even if the methods of Dr. Kamman would be applied there would not result the Reichmark amount claimed by the insured;

That first of all it could not be understood why just this method should be taken as a basis; that it had not been proven that this method was the only possible method for obtaining a uniform distribution of the profit; that in particular it would first have to be ascertained in detail how the group had fared to which the insured belonged; that in accordance with this it might be possible that the insured would receive less than he did receive pursuant to the proceedings applicable to insurances in accordance with the provisions of the German Revalorization Law.

Plaintiff opposed the allegation of defendant.

As to the further allegations of the parties, reference is had to the briefs of plaintiff of December 21, 1928, January 5, 1929, October 23, 1929 and of Defendant of February 9, 1929.

GROUNDS FOR THE DECISION.

As has already been set forth by the Court rendering judgment in this matter in its judgment rendered in the similar action Reichel vs. New York, 62 O. 535.28, the insured may in general de-

mand unrestricted revaluation in accordance with Articles 242,157, of the German Civil Code in connection with the claim for the payment of the profit dividend.

A revaluation in accordance with the provisions of the Revalorization Law does not enter into question, for although the other provisions of Pars. 1, 59 and following paragraphs of the Revalorization Law and of Article 95, 115 of the Enforcement Ordinance to the Revalorization Law, apply, there is missing the "definiteness" of the claim required in accordance with Article 95 of the Enforcement Ordinance.

As to the grounds, reference is had to the statements contained in the said Judgment of November 12, 1929 rendered in the matter Reichel vs. New York in which the same counsel appeared.

Revalorization obligation on the part of defendant in the case under consideration here must nevertheless be denied. The payment of the profit dividend took place on August 5, 1919 and converted in accordance with the table of the revaluation law possessed a gold value of 664.92 gold marks.

At that time the Mark was worth still about 25% of the pre-war value and its purchasing power in accordance with the general living conditions prevailing at that time had not even depreciated to that extent.

Taking into consideration these facts there cannot be assumed, in accordance with the principles of good faith and morals a revalorization obliga-

tion of defendant for the profit dividends paid in the year 1919.

The action of plaintiff therefore had to be dismissed.

The decision as to costs is based on Par. 91 of the Code of Civil Procedure.

(Signed) KERN; Landsberg; Thomsen.

For a true copy: Signed: Liske,

County Clerk and Recording Official of the Superior Court. [314]

EXHIBIT "Y."

43.0.361.23 at 13.

In the Name of the People.

Published on May 17, 1924.

Signed—Buchtemann, First Secretary of Justice.

In the law suit of the widow Mrs. Martha DESSAU, maiden name DUB, in Reichenberg, represented by her tutor, the lawyer Dr. Abeles, in Gablonz,

Plaintiff,

Attorneys of the law suit: Breslauer, Dres Hantke and Leszynsky in Berlin, No. 51 Mohrenstrasse,

versus

The New York Life Insurance Company of Berlin, represented by its Director General Guido von Nimptsch in Berlin, Wilhelmstrasse 80,

Defendant.

Attorneys: Counsel of Justice A. von Simpson, J. R. Dr. A. von Simpson, Dr. Ernst Wolff and Fritz von Werner in Berlin N. W. 7, Sommerstrasse 5.

For a claim of life insurance.

At the audience of 10th May, 1924, under the corporation of Director Justice Franz and the Counsellors of Justice Hartwig and Stein, has recognized the 26th Chamber of Civil Court in Berlin as incompetent.

The plaintiff has been rejected with her complaint and condemned to bear the expenses of the lawsuit.

FACTS.

Through the branch office of the Defendant in Paris (Policy No. 1 070 961—Bl.9 of the 28th November 1909) the life of the husband of the plaintiff, Josef DESSAU, living [315] at that time in Gablonz, has been insured in favor of the Plaintiff, for an insured amount of French francs 30,000. Josef DESSAU died on the 18th December, 1918 in Berlin-Schoneberg, his last domicile. The plaintiff who through marriage with a husband of German nationality also became a German subject, has been, in her native country, Bohemia, put under tutorship on account of mental disturbances.

The Plaintiff claims from the Defendant, who has in Berlin a duly registered branch office, payment of the insurance amount. This amount, through various circumstances, has been reduced to

French Fr. 25178.90 and she claims that the Defendant be condemned to pay to the Plaintiff said amount of French Fr. 25178.90 or the value of this amount at the rate of exchange on the day of payment, besides 4% interest from 18th December 1918, and to declare that for safety the judgment should be executed.

Requests that the Plaintiff should be rejected with her complaint by paying all the expenses.

The Defendant argues:

a) that the Tribunal is not a competent, seeing that as jurisdiction and place of payment the City of Paris has been fixed. No mention was contained in the French policy of the Berlin branch office, as this can be noted from the business relations between the deceased husband of the Plaintiff and the branch office which has never exercised independent functions, but has always been a dependent organism of the New York Life Insurance Company in Paris, where said branch office was obliged to report all transactions. That the insurance policy has always been a French contract and remains such is proved specially by the fact that on the 29th [316] December 1914 the insured asked for a loan which was granted to him by the Paris office and that in September 1916 he took advantage of the French Moratorium. Even the fact that subsequent premiums were not paid in Paris and that the policyholder removed his domicile to Berlin does not alter anything in the French character of the business Sec. 21 2PO and Sec. 89 of the PVG cannot

be considered, as same only refer to German business transactions.

b) from a material and legal point of view, the complaint is also unfounded, because the French Government, according to Art. 297 of the Peace Treaty of Versailles has sequestrated this insurance amount;

c) finally it must be pointed out that the Defendant has transferred its German insurance stock to the Kronos and the French insurance stock—to which the policy of the Plaintiff belongs—to the Union Life Insurance Company in Paris. This proceedure, known as "transfer of the insurance business," according to Art. 14 VAG necessitates the agreement of the Insurance Department. According to Sec. 4 of the Convention and Sec. 43, Art. 1 VAG, such a transfer must be authorized by the Supreme Authority, but does not need the approval of the Insured, especially as in the present case, a mutual company is involved, where the policyholders do not figure as creditors, but exist with regard to said company in the first place as "members."

The plaintiff replied that, according to Sec. 23 ZPO and Sec. 89 VAG, the Tribunal was competent. Although the competency of the Tribunals of the Department of the Seine has been fixed in the policy, this agreement can be explained in such a way that the competency remains only in force if [317] the Plaintiff is in a position to realize a right on the basis of a judgment coming from this source. In the present case this is excluded, because French

judgments, as reciprocity does not exist, are not recognized according to German right. Besides, it is not in the interests of the parties that a judgment of another Tribunal should be excluded; it is not in the interests of the Defendant that judgments of New York and other offices of the Company should be excluded; it is not in the interests of the policy-holder that other places should be excluded, where he is likely to take up his domicile. If this objection is not admitted, it would go against the general principles of German right and could be considered as void, because forced executions of civil juridical claims cannot be put aside by the fact that the competency of foreign Tribunals has been agreed upon, the judgment of which, according to German right, cannot be recognized. The plaintiff also points out that this condition of the contract can no longer be valid, because since the War the conditions between the two countries have been completely changed; Germany does not find before the French Tribunals an equal fair treatment. This is true especially in this case because the French Government, according to the statements of the Defendant, has sequestrated the claim of the Plaintiff. The plaintiff contends this sequestration, pointing out that it cannot have any force against her, because it was executed by the French Government without any right. She points out that the French office in Berlin, in consequence of the payment of the premiums there, and the whole correspondence of the policy-holder who took up domi-

cile in Berlin, shows that the competency of Berlin has also an effect upon the contract. [318]

In regard to the objection of the Defendant in Art. c), the Plaintiff declares that the transfer of the debt of the defendant, without the approbation of the policy-holder, cannot be considered as valid. The plaintiff also contends that the Defendant is a mutual company. The Defendant contends this statement and points out that the recognition of the French judgment would have been already excluded at the time when the contract was signed; consequently the juridicial situation has not changed, which proves that this fact does not exclude the agreement of competency of a foreign Tribunal.

An information taken by the Tribunal of Commerce proves that the Defendant has been registered as a mutual life insurance company.

ARGUMENT FOR JUDGMENT.

The competency of the Tribunal, according to Art. 23 ZPO could only be contested if no exclusive competency of tribunals had been agreed upon. The competency, according to Art. 21 ZPO can only be fixed when an inland German business is involved, belonging to the branch office in Berlin of the Defendant. Even in such a case, according to Sec. 89 PVG of the 12th May 1901, the agreement as to competency of another Tribunal would be excluded: but this presumption does not exist here, according to the contract of 28th November 1909, because the competency of the Tribunals of Paris has been fixed. This agreement cannot be explained in the

purport as the Plaintiff does, stating that this competency should only be in force if the Plaintiff, according to a judgment of the French Tribunals, should wish to realize her rights in Germany. The recognition of the French judgments was already [319] excluded in Germany at the time of the conclusion of the contract, because the reciprocity with Germany did not exist. The juridical situation, consequently, was the same as it is now, and the parties must have special reasons to have pointed out such an agreement. We cannot say that said agreement in this case is in opposition with the general principles of the German law. We read in Gaups-Stein at Sec. 36, observation IV ZPO that "the agreement for competency of a foreign Tribunal could be accepted if the parties so desired and if they point out the incompetency of the German Tribunals even in such cases where the judgment of the foreign Tribunals could be recognized in Germany." The decision pointed out by the Plaintiff (KG in Bl. f. decision of 1922 S 13 and one against mutual life insurance companies 24.C.-4581.22 does not refer to the present case, because the situation of that case is quite different. The interests at the Paris office of the Defendant, to point out an exclusive competency of the Tribunal, lies in the fact that the administration of large enterprises, which have branch offices in all countries of the Continent, can be better controlled and administered by these branch offices, and the Branch office of Berlin could not take the necessary measures in a matter of which it did not know sufficiently and in

which it only acted as intermediary. To that the policy-holder has completely agreed. Even the fact that later on the policy-holder took up his domicile in Germany and has paid his premium there, cannot lead to another interpretation. The same thing can be said of the fact that our situation with France has become worse and that the latter has sequestrated the claim. If the policy-holder had wished to change these facts, he ought to have expressed that clearly and ought to have asked that the jurisdiction of his policy be changed to the Branch Office of Berlin. It cannot be admitted that, when it seems more advantageous for him, he uses the French [320] Moratorium, he considers the contract to be a French one; but now that the sequestration proves disagreeable to him, he would prefer to look upon it as a German business.

There can be no question of the Berlin branch office of the Defendant Company, interfering in this affair, as it is justly pointed out by the Defendant The Berlin branch office, as can be seen from the non-contended correspondence Bl.15ff. has never exercised independent functions and has only been active as a dependent intermediary person of the Paris Office from which it has received instructions and to which it had to make its reports. It is from the Paris office that in 1914 the insured requested a loan, which was granted in compliance with the form used for French policies. The policy-holder has besides that, in September 1916, used the French Moratorium and has thereby undoubtedly expressed that he considered the business as a French one. The subsequent removal of the in-

sured to Germany and his paying premiums in Berlin could never change anything in the character of said business, because all the juridical actions which through the intermediary of the German branch office have taken place, found their basis in the original foreign insurance contract. Consequently, the plaintiff cannot base herself on Sec. 21 ZPO and Sec. 89 PVG, because these paragraphs refer to interior German transactions (Decision of KG in the appendix of the publications of the Insurance Department 1910 S. 54).

The complaint is to be refuted on account of lack of local competency.

The Tribunal has also to refute the objection of the plaintiff that through the transfers of the French and German insurance business, she has been prejudiced. The prescription [321] of Sec. 14 VAG, pointing out that such a transfer of the insurance stock to another enterprise needs the approval of the controlling authorities, and Secs. 43 & 44 VAG, stating that such fusion transactions have to be approved by the supreme authorities, do not render necessary the agreement of the insured as a creditor. Otherwise these decisions would have no practical significance. A decision of the supreme authority must be sufficient if, as in the present case, there is a question of a mutual company, because in this case the insured do not exist as creditors, but in the first place as members, and consequently the decision is binding on them. The rejection of the complaint, consequently, is justified also for this reason.

As regards the objection of the Defendant that the sequestration of the amount by the French Government hinders the payment of this claim, it seems unnecessary to enter into the argumentation of this fact.

The decision, as regards expenses, is based on Sec. 91 ZPO.

Signed: FRANZ. HARTWIG. STEIN.

Delivered Berlin, 31st May, 1924.

Stamp
Prussian
Civil Tribunal 1
Berlin

Signed: Hinkelmann, Employee of the Office as Copyist of the Tribunal 1. [322]

EXHIBIT "Z."

Copy

24 U. 5116–27.

Published on November 2, 1927.

Signed: Schaefer, as Clerk.

In the Name of the People.

In the matter of the merchant Wilhelm Rinck in Madrid, Plaza Progreso 15, now in Berlin W. 50, Ansbacherstr. 27 II,

Plaintiff and Plaintiff in Appeal,

Counsel, the Attorneys at law Dr. Carl Horn and E. G. Wegener in Berlin W. 62, Kleiststr. 27,

vs.

The Mutual Insurance Company, i. e., the New York Life Insurance Company in New York, 346–348

Broadway, represented by its President Darwin Kingsley of the same place,

Defendant and Defendant in Appeal Proceedings.

Counsel: Attorney at law Dr. Walter v. Simson in Berlin-Wilmersdorf, Kaiserallee 31 s.

For 4100 RM (Claim arising out of an insurance contract),—part 24 for Civil Matters of the Court of Appeals in Berlin pursuant to the hearing of November 2, 1927, the court consisting of the presiding justice Pleus and the Superior Court justices Dr. Biermann and Hoeck, has decreed:

The appeal of the plaintiff against the judgment published on March 7, 1927 of part 30 for Civil Matters of the Superior Court I Berlin is denied. The costs of the appeal proceedings must be bourne by plaintiff.

The judgment is provisionally enforceable pending [323] appeal.

Plaintiff is however, permitted to stay execution proceedings by the giving of surety in the amount of 2000 RM.

STATEMENT OF FACTS.

Plaintiff, a German citizen who at that time had his domicile in Madrid, had contracted in the year 1902 with the defendant, a life insurance contract as covered by the policy No. 1,502,132 dated July 17, 1902, filed with the Court records. The contraction of the insurance took place through the intermediary of the agency of defendant in Madrid, through the general secretary of defendant for Eur-

ope who at that time has and still has his domicile at Paris. The insurance policy which is drawn up throughout in the Spanish language peovides for an insurance amount of 25,000 Pesetas and 20 years premium payment. The policy has been executed (as is stated in the special terms printed thereon) with accumulation of profit for a period of 20 years terminating on July 17, 1922. If the insured was alive on the said day at noon and provided he had paid in full all the premiums, it is stated that the company at such time will allot to the insured or his legal successors the respective profit. In connection therewith it is stipulated that the policy can be settled in four different especially regulated manners or options. The parties may agree that originally there was to apply for the entire contract relationship, the Spanish law and that as mutual place of performance the city of Madrid had been agreed upon. In the general insurance terms the following was especially stipulated: [324]

> "For the performance of this contract only the courts of Madrid are vested with jurisdiction. As legal domicile for the company there is stipulated the business office of its Madrid Branch Office."

Plaintiff has duly paid during the first ten years, his premiums in Spanish currency i. e. a total of 16,954.80 Pesetas.

In the spring of 1912 he got in touch with the Madrid agency of defendant on account of certain changes of the contract desired by him; when during

April and May 1912 he stayed in Berlin-Friedenau, Schwalbacherstr. 10, he continued these negotiations with defendant through the Berlin office of the latter. By letter of April 18, 1912 the cashier of the Berlin office advised him as follows: "We shall attend to the further collections of your premiums due on the above policy, from here beginning with July 17, 1912." Thereupon plaintiff wrote the following letter to the "Lebens-Versicherungs-Gesellschaft New York Berlin W" dated April 30, 1912; "Referring to my correspondence with your agency in Madrid as also to your letter of the 18th inst. I am sending you herewith my policy for the purpose to note on same that the capital and premiums, with the agreed upon mark amounts are payable in Berlin. After such annotation is made please return the policy to me."

By letter of May 9, 1912 thereupon the "Secretary for Germany" of defendant returned to him the policy with the following remarks:

> ". . . . after now on the 4th page of the document an additional annotation has been made in accordance with which, pursuant to your wishes, the premiums as also, at the time, the capital are payable here in Berlin in marks . . . . " [325]

This subsequent entry is again entered in the Spanish language on the insurance certificate signed by the Secretary General of the defendant for Europe and dated May 7, 1912. The certified and not contested translation of same reads as follows:

"In accordance with the written request of the insured the insurance amount of this policy is herewith converted from 25,000 pesetas to 18013 German Marks and the yearly premium beginning with July 17, 1912, is changed from 1691.50 Pesetas to 1272.90 German Marks. On account of this conversion all the amounts mentioned on the second page shall constitute the respective value in Marks figured on basis of the exchange rate of 100 Pesetas being equal to 75.25 German Marks is being however, stipulated and agreed that each premium payment as also each payment of this policy or settlement or any claim connected with same upon maturity, at the option of the company can be effected in marks or the counter value of same in pesetas in which connection there is taken as a basis for the computation at the time of payment the conversion rate of checks (drafts) on Berlin. All other terms of the policy remain the same."

It is not disputed that plaintiff has agreed to this subsequent annotation without raising any objection.

Since July 17, 1912 plaintiff remitted his premiums to the Berlin business office of defendant in German marks through banks or through postal transfer up to the expiration of the contemplated payment period of 20 years i. e. 1275.45 marks each year. There was connected herewith in the years 1912, 13 and 14 a brief [326] exchange of correspondence of plaintiff with the Secretary or Cashier (treasurer) of defendant in Berlin with regard to

the charging of certain stamp fees. Reference is had to the undisputed contents of these letters, copies of which are filed with the court records.

On Oct. 2, 1915, plaintiff addressed defendant in Berlin with the request to give him information with regard to loans available on the policy. The main agent for Germany replied on Oct. 5, 1915, as follows:

> "Inasmuch as there is concerned a policy contracted abroad, we had to get in touch in this regard with our business office competent in this regard. As soon as we have received information, we shall again refer to the matter."

To a letter of plaintiff dated Nov. 7, the main agent for Germany replied on Nov. 8, 1915, as follows:

> "That we are not competent for your above policy, inasmuch as the policy was issued in Spain and your place of fulfillment or performance is Madrid. We therefore had to get in touch with the office competent for your policy, in connection with the desired loan. We await the decision during the next few days and as soon as we have received same we shall not fail to immediately get in touch with you."

On Dec. 23, 1915, the plaintiff then received against the depositing of his policy, on the then value of same, a loan in the amount of 14,000 marks. After the World War the agency of defendant in Spain was discontinued.

After the expiration of 20 years, in July, 1922, plaintiff decided to collect the total value of the policy, including the accumulated profit dividend. Thereupon, on Aug. 4, 1922, there were paid to his account with the [327] Uebersesiche Bank in Berlin 15: 364.29 marks, after he had signed the receipts, drawn up in the English and German languages, filed with the records (Exhibits 39 and 40 of the Records). In this receipt plaintiff acknowledges the receipt of the amount of 29,779.29 marks, in settlement of all rights and claims arising out of policy No. 1,502,132, on the life of Mr. Wilhelm Rinck. On the receipt there appears the following statement:

Guaranteed cash value	22,632.04 Marks
Accumulated profits	7,147.25 Marks
	29,779.29 Marks
Loss Loan	14,400.00 Marks
Net	15,379.29 Marks

The secretary of defendant for Germany previously had sent to plaintiff the letter dated July 25, 1922, to the contents of which reference is had.

Plaintiff now refuses to have the payment of 15,364.20 Marks in August, 1922, applied against him. He alleges that this amount at that time corresponded to a gold mark value of 84 gold marks. He has claimed revaluation or conversion of this paper mark amount and claimed that upon the change of the insurance contract in the year 1912, the entire contract relationship had been subjected to German law and that also the mutual place of

fulfillment and performance had been transferred from Madrid to Berlin; that the revaluation and conversion had to take place therefore in accordance with the provisions of the German law, in which connection unrestricted revaluation had to take place in accordance with the provisions of Par. 242 of the German Civil Code and not the revaluation in accordance with the restrictive provisions of the Revaluation Law, for the reason that defendant, for the insurance entering into question here, had never formed [328] (nor had been under the obligation to form) a premium reserve fund in Germany. That the revaluation therefore had to take place in its full amount, at the par value of the paper mark amount; that the loan granted in the year 1915 was not to be taken into consideration in this regard. That the German Court to which the action had been submitted was vested with jurisdiction in accordance with Pars. 23 and 29 of the Code of Civil Procedure; that the previously agreed upon exclusive jurisdiction of the Madrid courts had been cancelled by the agreement of the year 1912; and that furthermore defendant had discontinued its representation in Spain since a number of years.

Plaintiff therefore prayed the Court to condemn defendant to pay a partial amount of 4000 RM plus 6% interest as from Jan. 1, 1924.

Defendant prayed the Court to dismiss the action and took reference first of all to the question of the jurisdiction of the Court hearing the action. It alleged that the exclusive jurisdiction of the Madrid

courts had never been changed; that also the mutual place of performance was Madrid as heretofore, and that only the payments had to take place via Berlin. As heretofore Spanish law was controlling for the entire contract relationship; that this fact had also not been changed by the agreement of 1912, especially not by the subsequent annotation (supplement). That German legal principles covering revaluation could therefore not apply; that furthermore plaintiff had accepted the mark amount in the year 1922, without any reservations, and even accepted this amount in settlement of all rights and claims and that lastly he would have to admit a set-off or accounting of the loan paid him in the [329] year 1915 in full gold mark value of 14,000 marks, against the then to be revalued total claim, in which connection, by weighing fairly and equitably the relations of both parties, in such event nothing would be left over any more for plaintiff. That plaintiff himself, in the letter dated May 21, 1926, and addressed to the German Supervision Office for Private Insurance, had substantially assumed this viewpoint of defendant. Reference is had to the contents of this letter (Exhibit 55 of the Record), which is not disputed.

The Superior Court, by the judgment referred to above, dismissed the complaint. The Court also accepted its own local jurisdiction as such, stating that in the year 1912 the place of fulfillment for both parties had been transferred from Madrid to Berlin; that German law was to be applied but that plaintiff on his part was under the obligation to revalue the loan; that this loan was to be revalued

at least in an amount of 4000 RM and that therefore the claim of the complaint was settled (became null and void). Against this judgment, to the statements of fact of which and to the grounds and reasons of which reference is also had, plaintiff has instituted appeal proceedings in due time and manner, praying:

Reversing the judgment appealed from, to condemn defendant to pay to plaintiff 4,100 RM plus 6% interest as from January 1, 1924, but in case judgment is rendered against plaintiff to pay the court costs, to permit plaintiff to stay execution proceedings by the giving of surety.

Defendant has submitted the following prayer:

To dismiss the appeal with award of costs but in case judgment should be rendered against it, to allow it to stay execution proceedings by the giving of bond. [330]

Defendant first of all submitted again the objection that the court was not vested with jurisdiction. Plaintiff in this connection referred to Paragraph 512a of the Code of Civil Procedure. He adhered to his allegation that by his agreement of the year 1813 there was cancelled not only the exclusive-jurisdiction of the courts of Madrid but that also the mutual place of performance had been changed from Madrid to Berlin and that the entire contract relationship from that time on had been subjected to the provisions of the German law. He demanded from defendant the submission of his correspondence with the agency in Madrid in the spring of 1912, referred to in the letter of April 30, 1912, alleging that same formed the basis of the new

agreement; that from same appeared his communication to the Madrid agency of defendant to the effect that he had given up his domicile in Madrid and wanted to return to Germany and that for this reason he wanted to obtain a German policy and wanted the Spanish policy converted into a German policy for the reason that he wanted to have eliminated the Spanish courts and the application of the Spanish law in order to be placed under German jurisdiction. Defendant declared its willingness to submit this correspondence if the court deemed this necessary, stating furthermore that it first had to be ascertained whether this correspondence was in New York with the defendant or in Paris with the General Secretary; that the business office of defendant in Berlin did not have this correspondence on file and never had had this correspondence on file. Defendant, however, also denies that this correspondence had been of the contents alleged by plaintiff; that it never had the intention to carry out the wishes alleged by plaintiff; that its intention resulted from the subsequent annotation (Supplement) and from the letter of transmittal; that if [331] plaintiff had desired anything else, no agreement in this regard had at all been reached.

In order to substantiate his claim plaintiff also alleged that he rested his complaint first of all on the claim to the payment or revaluation of the profit dividend and secondarily on the claim to payment or revaluation of the insurance claim.

Otherwise the parties submitted the same statements and allegations as those submitted by them to the court below.

Furthermore plaintiff again submitted the contents of his briefs of May 30 and October 1, 22, 26 and 29, 1927. Defendant repeated the contents of its briefs of September 8 and October 25 and 29. Reference is had to same.

GROUNDS FOR THE DECISION.

The appeal which in itself was permissible could not be successful.

In judging the contract relationship of the parties as a whole as also in all individual relations, the court must first of all proceed from the fact that in accordance with the agreement executed at the time of the contracting of the policy it was made subject to the provisions of the Spanish law. This results not only from the fact that in the year 1902 plaintiff had his permanent domicile in Madrid while defendant was also there permanently represented; that the insurance certificate had been drawn up completely in the Spanish language and that all mutual performances were laid down exclusively in the Spanish currency; that in accordance with the contents of the agreement there cannot be any doubt that Madrid was to be the mutual place of performance and that finally the courts of Madrid were declared as vested with exclusive jurisdiction. At the [332] hearing both parties have not cast any doubt on the application of Spanish law for the entire original agreement. From this it follows: First that the agreement, in all its relations, remained subject to Spanish law, in-so-far as same would not be changed by agreement, as to the entirety of the contractual relations or with regard

to individual stipulations; second, that such contractual changes insofar as they were made still during the time when the Spanish law was governing, in particular therefore all changes made in the year 1912 at the time of the stipulation of the supplement to the insurance certificate, are subject to being judged in accordance with the provisions of Spanish law.

Upon inquiry by the court, both parties declared that they could not claim that the legal principles of Spanish law governing the interpretation of declarations of intention, in particular also in connection with changes of contracts, insofar as the latter are subject to the free disposal of the parties,—differed from the German law. The court for this reason starts from the principle that Spanish law with regard to the interpretation of the agreements of the parties and their effect on the contract relationship, corresponds to the respective German legal principles. To this extent the court bases its interpretation of the contract on Spanish law.

In accordance with this it is to be ascertained whether the parties intended to carry out the comprehensive change of the contract as claimed by plaintiff, i. e. whether, to use the words of plaintiff, it was intended to change a Spanish policy into a German policy. If this was the case then indeed the court would have to proceed from the consideration that the exclusive jurisdiction of the Courts [333] of Madrid, in accordance with the agreement, was to be cancelled. The Court, however, cannot agree to this viewpoint of plaintiff, without requiring the submission of the correspondence of

plaintiff with the Madrid agency from the year 1912. In order to bring about a change in the contract, there was required the concurrent will and intention of both parties. However, the intention of defendant clearly appears from the supplement on the policy dated May 7, 1912, which is signed by the competent Secretary-General of defendant for Europe. In same it is confirmed that the insurance amount and also the premium are converted into German marks; that it is, however, agreed that any payment, upon maturity, at the option of defendant, can be paid in marks or in the counter value of same in pesetas in which connection, for the computation on the day of payment, there was to be used as a basis the exchange rate prevailing for checks or drafts on Berlin. We furthermore read: "All other terms of the policy remain the same." To this supplement there corresponded also the letter of the Secretary for Germany of May 9, 1912, to the effect that in accordance with this the premium and, at the proper time also the capital, were now to be paid in marks here in Berlin. If one also takes into consideration that plaintiff himself, in his letter accompanying the policy, dated April 30, 1912, especially referred to the letter of the German cashier (treasurer) of April 18, in which it is stated that the future collections of the premiums, as from July 17, 1912, shall be attended to from Berlin, then it cannot be doubted that the defendant merely wanted to come to an agreement with plaintiff to the effect that plaintiff in the future was to pay his premiums in German currency in Germany and that he was also to receive

from that time on in Germany his insurance principal [334] and other performances of defendant in German marks, but always still at the option of defendant, in marks or in pesetas, on basis of a stipulated conversion rate. All other contractual terms were to remain as before. This was the intention of defendant and it has expressed it in this manner in the supplement and plaintiff has not contradicted this in any manner whatsoever. In particular plaintiff has also not been able to maintain that already previously, by his correspondence with Madrid, more far-reaching changes had been agreed upon in a binding manner, which furthermore appears excluded when viewing the status of the prevailing conditions and relations. In accordance with this the agreement as to vesting the Courts of Madrid with exclusive jurisdiction has not been changed and with this is the more plausible as also no agreement has ben reached with regard to replacing the application of the Spanish law by the German law. From the conversation of the currency and from the fact that the due performances were to be made in Berlin, this cannot by any means be deduced, the more so as the Court can also not agree with the allegation of plaintiff that the mutual place of performance or even only the place of performance of one of the parties had been changed, by the supplement, from Madrid to Berlin. Nothing of the kind has been agreed upon, for the reason that the intention of defendant (as expressed in the supplement and possibly also in the letter) was not to this effect and for the reason also that plaintiff had been satisfied with the supple-

ment. If therefore the intention of plaintiff was different, and if same had been expressed in the correspondence with Madrid, it must be stated that as mentioned above same was not approved by defendant and it can at most be doubtful [335] whether in such event there has taken place a binding change of the contract (agreement). This would not cause any change in the further validity of the provisions or stipulations in question here. In accordance with this, therefore, it must be stated that in any event the Courts of Madrid remained vested with exclusive jurisdiction, which also appears from the continued validity and application of Spanish law. This is also not changed by the later discontinuance of the Spanish agency of defendant.

The fact that also plaintiff was clearly informed of the fact that his policy remained a Spanish policy, results from the correspondence of the parties during the later years. In favor of this is also the undisputed fact that this insurance was never taken over into the German insurance assets of defendant. Also the Berlin agency of defendant has treated same always as a Spanish insurance and has also expressed this fact toward the plaintiff.

The Court is therefore of the opinion that the Court below wrongfully declared itself competent for the action. Another question to be decided in accordance with the provisions of German procedure law is whether defendant can claim this still in appeal proceedings. Plaintiff in this regard refers to Par. 512a of the Code of Civil Procedure and is of the opinion that by this provision the sub-

sequent examination of the local competency or jurisdiction was removed from the judgment of the Court of Appeals, i. e. if the Court below has assumed that it was vested with jurisdiction. This interpretation, it appears, is also assumed by Stein-Jonas in the new edition of his Commentary to the Code of Civil Procedure, although no grounds or reasons are given in the said commentary for this, and as it furthermore appears doubtful whether the [336] Commentator intended to discuss the case in which the Court is interested here. The Court therefore cannot agree to the interpretation of plaintiff, for Par. 512a refers, it is true, to the case under consideration that the court below has wrongfully assumed that it was vested with jurisdiction, but this provision of the law does not make it a general rule that the subsequent examination of this question was withdrawn from the examination by the Court of Appeals. If the legislator had intended this, he could have expressed this is a few clear words. Instead of this the legislator declared just as clearly that in this case the appeal, in litigation covering property claims, could not be based on the allegation that the Court below had wrongfully assumed that it was competent to hear the action. The fact that also the defendant in appeal proceedings in this manner was to lose the right to this objection, has not in any way been expressed by this. The Court does not consider it permissible to interpret a clear provison of the law in a more far-reaching manner, so that there is brought about in this manner so as to say a complementing of the law. Plaintiff can also not claim that in such event

the parties are treated in a partial manner by the law. What is good for the plaintiff in appeal proceedings must also be fair and equitable to the defendant in appeal proceedings. The parties are not plaintiffs and defendants in appeal proceedings, but merely plaintiffs and defendants, and the case of the non-permissibility of the appeal in accordance with Par. 512a can apply, in accordance with the status of the action, to plaintiff as also to defendant, as also on the other hand, dependent on the status of the action, there must be granted both to plaintiff and also to defendant the [337] right to repeat the objection with regard to which in his opinion a wrong decision has been rendered, before the Court of Appeals. If therefore the German Court is not vested with jurisdiction, the action ought to be dismissed for this reason without it being necessary for this court to enter into a discussion of the substantive legal status.

In accordance with the above, judgment had to be rendered as above.

The ancillary decisions are based on the provisions of Pars. 91,706 and 713 of the Code of Civil Procedure.

Signed: Pleuss Dr. Biermann Hoeck.

For true copy.

Berlin, Dec. 8, 1927.

Kompin, Assistant Clerk,
Acting Court Clerk of the Court of Appeals of Berlin.

In the foregoing action no further brief in appeal

has been submitted within the time from Nov. 2 to Jan. 16, 1928, to the Supreme Court of Germany.

Leipzig, Jan. 20, 1928.

Office of the Court Clerk of Division XIII of the Supreme Court of Germany.

The foregoing judgment has entered into force and has become valid.

Berlin, Feb. 6, 1928.

Signature,

Clerk of the Superior Court I.

13Z700/28.

Filed June 7, 1930. [338]

AND AFTERWARDS, to wit, on the 7th day of June, 1930, there was duly filed in said court an affidavit of A. E. Clark, in words and figures as follows, to wit: [339]

[Title of Court and Cause—No. L.–10,465.]

AFFIDAVIT OF A. E. CLARK.

State of Oregon,
County of Multnomah,—ss.

I, A. E. Clark, being first duly sworn, upon oath depose and say:

That I am one of the attorneys of record for the defendant in the above-entitled action, and in all other actions now pending in this court and the Circuit Court of the State of Oregon for Multnomah County, brought against the defendant upon German Mark contracts, and I am also one of

the attorneys of record in all actions now pending in this court and in the Circuit Court of the State of Oregon for Multnomah County against the Guardian Life Insurance Company upon German Mark contracts. [340]

That the following cases are now pending in this court against the New York Life Insurance Company brought by citizens and residents of Germany upon insurance policies issued by the defendant in the German language in Germany, payable in German Marks, and in all respects performable in Germany:

1. The above-entitled action to recover on three (3) policies, two (2) for 100,000 Marks each, and one (1) for 200,000 Marks, each being the basis of a cause of action, and each issued in Berlin, Germany to plaintiff, a German citizen and resident of Berlin.

2. L.–10,462, Elias Oberbrunner plaintiff, brought to recover on two (2) policies of insurance, each being the basis of a cause of action. Each policy is for 10,000 Marks and each issued by the defendant in Germany to the said Oberbrunner, a citizen of Germany, residing at Offenburg, Baden, Germany.

3. L–10,470 Soloman Gans, plaintiff, brought to recover on one (1) policy of insurance for 50,000 Marks issued by defendant in Germany to said Gans, a citizen of Germany, residing at Saarbrucken, Prussia.

4. L.–10,476 Alice Seligstein, plaintiff, brought to recover on three (3) policies of insurance, each being the basis of a separate cause of action. One

of said policies is for the alleged sum of 50,000 Marks, another is for the alleged sum of 10,000 Marks paid-up insurance, and the third is for the alleged sum of 10,000 Marks paid-up insurance. Each of said policies was issued by the defendant at its office in Berlin, Germany, to Uriel Seligstein, then husband [341] of the plaintiff, a citizen of Germany and a resident of Schweinfurt, Luitpoldstr No. 32, Germany.

5. L.–10,649 Henrich Adolph Paul Muller, plaintiff, brought to recover upon an annuity policy, it being alleged that there are six (6) installments unpaid. The policy was issued by the defendant at Frankfort A/M Hessen, Nassau, Germany, to the said Muller, a citizen of Germany and a resident of said Frankfort.

6. L.–10,637 Emmy Weber, plaintiff, brought to recover upon a policy alleged to be in the sum of 10,000 Marks issued by the defendant at its Berlin office to Friedrich Wilhelm Weber (then husband of the plaintiff), a citizen of Germany and a resident of Berlin.

7. L.–10,648 Emily Lasard, plaintiff, brought to recover six (6) installments aggregating about 70,000 Marks upon an insurance contract issued by defendant at Berlin, Germany to the plaintiff and Dr. Adolph Lasard, or the survivor thereof, the insured being citizens of Germany and residents of Berlin, Germany.

8. L.–10,475 Paul Herrmann, plaintiff, brought to recover upon seven (7) different insurance policies issued to seven different persons and made

the basis of seven separate causes of action. Each of said policies was issued by the defendant in Germany to a German citizen and resident thereof, and the said plaintiff, a German citizen and resident of Heidelberg, Germany, claims to be the assignee thereof.

9. L.–10,489 Paul Herrmann, plaintiff, brought by him as alleged assignee to recover upon one hundred fifteen (115) different policies of insurance issued by the defendant in Germany to 115 residents and citizens of Germany, being made the basis of 115 separate causes of action. [342]

10. L.–10,535 Paul Herrmann, plaintiff, brought by him as alleged assignee upon four (4) separate insurance policies issued by the defendant in Germany to four different persons, citizens and residents of Germany. Each policy is the basis of a separate cause of action.

11. L.–10,536 Paul Herrmann, plaintiff, brought by him as alleged assignee of thirty-nine (39) separate insurance policies issued by the defendant in Germany to 39 different persons, citizens and residents of Germany. Each policy is the basis of a separate cause of action.

12. L.–10,537 Paul Herrmann, plaintiff, brought by him as alleged assignee of eight (8) separate policies issued by the defendant in Germany to eight different persons, residents and citizens of Germany.

13. L.–10,670 Paul Herrmann, plaintiff, brought by him as alleged assignee on seven (7) separate policies of insurance issued by the defendant in

Germany to seven different persons, citizens and residents of Germany.

In the foregoing actions against the New York Life Insurance Company there are 192 separate insurance policies involved and 192 separate causes of action.

That there are pending in this court the following actions against the Guardian Life Insurance Company having its office and principal place of business in New York City, New York, brought on German Mark Insurance policies issued by the said Guardian Life Insurance Company in Germany to citizens and residents of Germany, in the German language, payable in German Marks and otherwise performable in Germany: [343]

14. L.–10,671 Emily Lasard, plaintiff, brought to recover six (6) installments aggregating about 23,000 Marks upon an annuity policy issued by the said Guardian Life Insurance Company (then Germania Life) at its office in Berlin, Germany, payable in Berlin to the plaintiff and Dr. Adolph Lasard, or the survivor thereof, citizens of Germany and residents of Baden Baden, Germany.

15. L.–10672 Marie Margarethe Schutte, plaintiff, brought to recover on two (2) insurance policies issued by the said Guardian Life Insurance Company in Germany to Joseph Schutte (then husband of the plaintiff), a citizen of Germany and a resident of Hanover, Germany.

16. L.–10,508 Paul Herrmann, plaintiff, brought as alleged assignee to recover on twenty-two (22) insurance policies issued by the Guardian Life

Insurance Company to nineteen (19) different persons, citizens and residents of Germany. The number of policies exceeds the number of policy-holders for the reason that in three different instances two (2) policies were issued to one person.

17. L.–10,507 Paul Herrmann, plaintiff, brought by him as alleged assignee to recover on six (6) separate insurance policies issued by said Guardian Life Insurance Company to six different persons, citizens and residents of Germany.

18. L.–10,545 Paul Herrmann, plaintiff, brought by him as alleged assignee to recover on fifteen (15) separate insurance policies issued by the Guardian Life Insurance Company to fourteen (14) different persons, citizens and residents of Germany. The number of policies exceeds the number of policy-holders for the reason that two of said policies were issued to the same person. [344]

19. L.–10,546 Paul Herrmann, plaintiff, brought by him as alleged assignee to recover on four (4) separate insurance policies issued by said Guardian Life Insurance Company to four different persons, citizens and residents of Germany.

In the foregoing actions against the Guardian Life Insurance Company there are 50 separate insurance policies involved and 50 separate causes of action.

There are now pending in the Circuit Court of the State of Oregon for Multnomah County the following cases brought against the New York Life Insurance Company upon German Mark contracts issued by said company in Germany to German

citizens and residents, written in the German language, payable in German Marks and otherwise performable in Germany:

20. N.–36 Julia Von Pott, plaintiff, brought on ten (10) counts of action to cover ten (10) separate installments alleged to be due upon an insurance policy issued by the defendant, payable at Berlin to the plaintiff, then a resident of Gratz, Styrgia, Austria.

21. N.–1238 Wilhelm Schell, Jr., plaintiff, brought to recover on one (1) policy of insurance issued by the defendant at its office on Frankfort a/m Hessen Nassau, Germany, to the plaintiff, a citizen of Germany and a resident of Offenburg, Baden.

22. N.–660 Max Josef Kaufman, plaintiff, brought to recover on one (1) policy of insurance issued by defendant at its office in Berlin to Kaufman, a citizen of Germany and a resident of Mannheim, Baden, Germany.

23. M.–4765 Adolp Kahn, plaintiff, brought to recover on one (1) policy of insurance issued by defendant at its office on Frankfort a/m Hessen, Nassau, Germany, to Kahn, a citizen of Germany and a resident of Offenburg Baden, Germany. [345]

24. N.–3223 Marie Weber, plaintiff, brought to recover on one (1) policy of insurance issued by the defendant at its office in Berlin to Marie Weber, a citizen of Germany and a resident of Hammenhofen, Germany.

25. N.–3298 Arthur Kaulfuss, plaintiff, brought to recover on one (1) policy of insurance issued by

the defendant at its office in Berlin to Kaulfuss, a citizen of Germany and a resident of Kusel, Bavaria.

26. N.–3376 Ewald Leutjohann, plaintiff, brought to recover on one (1) policy of insurance issued by the defendant at its office in Berlin to Leutjohann, a citizen of Germany and a resident of Liepzig, Germany.

There are now pending in the Circuit Court of the State of Oregon for Multnomah County the following cases brought against the Guardian Life Insurance Company upon German Mark contracts issued by said company in Germany to German citizens and subjects, written in the German language, payable in German Marks and otherwise performable in Germany:

27. N.–1297 Mrs. Max Hockenheimer, plaintiff, brought to recover on one (1) policy of insurance issued by the Guardian Life Insurance Company (then Germania Life) at its office in Berlin to Max Hockenheimer (then husband of the plaintiff), a citizen of Germany and a resident of Hockenheim, Baden.

28. N.–3299 C. F. Wilhelm, plaintiff, brought to recover on one (1) policy of insurance issued by the defendant at its office in Berlin to Wilhelm, a citizen of Germany and a resident of Oos, Baden.

Attached to this affidavit and marked Exhibit "A" is an instrument designated as a Power of Attorney. In this [346] connection affiant avers on information and belief that this is the form of instrument under which and pursuant to which all

and singular the foregoing actions against the New York Life Insurance Company and the Guardian Life Insurance Company are being prosecuted, and that it is under such form of Power of Attorney and/or assignment that Paul Hermann, therein mentioned, has brought the aforesaid actions wherein he appears as plaintiff.

That each of the policies issued by defendant, New York Life Insurance Company, and involved in the aforesaid actions against it, was issued prior to August first, 1914, and the several complaints filed against said company, as aforesaid, so allege.

That each of the policies issued by The Guardian Life Insurance Company, and involved in the aforesaid actions against it, was issued prior to May first, 1918, and the several complaints filed against said Company, as aforesaid, so allege.

A. E. CLARK.

Subscribed and sworn to before me this 6th day of June, 1930.

[Seal] R. R. BULLIVANT,
Notary Public for Oregon.

My commission expires: Aug. 2, 1930. [347]

EXHIBIT "A."

POWER OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, that I residing at ————, do hereby make, constitute and appoint the TRANSATLANTIC ESTATES & CREDIT COMPANY, Inc., of New

York City, and/or JOSEPH WIERNDLE of New York, N. Y. or C. T. HAAS of Portland, Oregon and/or PAUL HERMANN of Heidelberg, Ger*man,* its, his, or their agent, jointly and each of them severally my true and lawful Attorney or Attorneys-in-Fact, for me and in my name, place and stead to act for and represent me in all matters and proceedings whatsoever, in relation to that certain policy of insurance ————————, signed and issued by and on behalf of the ————————, of the City of New York U.S.A. in favor of ————————

And my said Attorney or Attorneys-in-Fact are hereby authorized and empowered to bring, prosecute and maintain any action, suit, proceeding, judicial or otherwise, which they may deem necessary or expedient, and for that purpose to employ such councel or councels, as they may deem fit; and to demand, sue for, collect, receive and receipt for all sums owing, or which may hereafter become due and owing, and all rights and obligations accruing under the said policy of insurance; to assign or transfer the said policy and all claims and rights existing, or hereafter accruing thereunder; to adjust, compromise and settle all claims, rights or obligations under the terms of said policy of insurance upon such terms and conditions as my said Attorney or Attorneys-in-Fact may fix; to release the said policy of insurance and all obligations thereunder, and to cancel and surrender up the same upon settlement and adjustment of all claims and obligations, arising thereunder to enter my appear-

ance in any suit, either at law or in equity, which may be instituted upon or in relation to the said policy of insurance; to prosecute any such suit in my name, or in the name of any person or corporation to which the said policy of insurance, or any sum due thereunder, or the rights and obligations arising therefrom, many have been assigned and transferred; to execute and deliver, either under seal or otherwise, any and all assignments, transfers, releases, receipts, and any other documents or instruments, *or* whatsoever nature that may be necessary or convenient in connection with the foregoing matters; to receive and receipt for all money, checks, drafts or payments in any form in connection with said matters; to have said checks, drafts, or other documents issued by way of payment in their own name, to negotiate endorse my name upon and receive payment in their own name; to negotiate endorse my name upon and receive payment of and upon any notes, checks, drafts or other documents, issued or payable to me in settlement, in whole or in part, or any sums or claims payable to me under said policy or otherwise; generally to say, do act, transact, accomplish and determine any and all matter and things whatsoever that I might, could or would do if personally present concerning all and singular the above matters.

And my said attorney or attorneys-in-fact are hereby authorized and empowered in their discretion, to substitute another Attorney or Attorneys-in-Fact individual or corporate, to carry out any

or all of the powers herein confered and to vest in and confer upon the said substituted Attorney or Attorneys-in-Fact, such powers and authority in relation to [348] the foregoing matters, as my said Attorney or Attorneys-in-Fact shall fix and determine.

IN CONSIDERATION of the sum of One Dollar and/or its equivalent to me in hand paid, the receipt of which is hereby acknowledged and of other good and valuable considerations and of the services performed and to be performed, and for and in consideration of money expended, and to be expended, in an endeavor to secure a refund on said above described policy, I hereby grant, sell assign, and transfer to TRANSATLANTIC ESTATES & CREDIT COMPANY, Inc. of New York City, and/or JOSEPH WOERNDLE of New York, N. Y. or C. T. HAAS of Portland, Oregon, and/or PAUL HERMANN of Heidelberg, Germany, its, his or their agent, in absolute ownership, an undivided twenty-five % or interest in and to all my right, title and interest in and to above described policy and in and to any right for refund, payment or repayment due me by virtue of said policy, or payments heretofore made me upon said policy, or any money due me from any settlements, made and obtained from the said ————, by reason of said policy, or any benefits expressed therein. And I hereby agree, that the authority hereby conveyed shall be irrevocable, and that this power of attorney is a power coupled with an interest therein and/or upon all the proceeds recovered by reason

thereof, binding upon my Executor Administrator, Trustee, and/or personal representative, and that it shall be engrafted upon any claim or claims due me by reason of said policy of insurance and any interest so due me therein, revoking all powers of attorney given by me in relation to the foregoing matters at any prior date. The said Attorney or Attorneys-in-Fact are directed to remit and transmit any money or moneys due me in the premises to me through its, his or their corresponding solicitor, person, corporation, association or bank.

IN WITNESS WHEREOF I have hereunto set my hand and seal this —— day of ————, A. D. 19——.

Witnesses:

————————————. (Seal)

Germany

State of ————
County of ————
City of ————

On this —— day of ————, 19——, before me, personally appeared: to me personally known, and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged to me that —— executed the same as —— free and voluntary act and deed for the uses and purposes therein mentioned.

Deutsches Reich.

Staat ————
Bezirk ————
Stadt ————

Am ———— 19——
erschien vor mir personlich: mir personlich bekant und mir bekannt als die Personlichkeit, welche vorhergehendes Schriftstuck ausgefuhrt und bestatigte mir, dass —— dasselbe ausgestellt h —— als —— freien Willan fur die in demselben enthaltenen Zwecke.

Notary Public
(Oeffentlicher Notar)

Filed June 7, 1930. [349]

AND AFTERWARDS, to wit, on the 7th day of June, 1930, there was duly filed in said court an affidavit of Walker Buckner, in words and figures as follows, to wit: [350]

[Title of Court and Cause—No. L.–10,465.]

AFFIDAVIT OF WALKER BUCKNER.

State of New York,
County of New York,—ss.

I, Walker Buckner, being first duly sworn, upon oath depose and say:

I am now, and for many years last past have been, a vice-president of New York Life Insurance Company, the above-named defendant. I am, in particular, thoroughly familiar with the former business of the defendant in Germany and the claims against it under Mark policies issued by it in Germany.

For many years prior to 1915 I was stationed in Paris, and was the officer of defendant in charge of the European business of defendant. During those years and in connection with said business I made frequent trips to Germany and became thoroughly familiar with all phases of the German business of the defendant. In 1915 I returned to and took up my permanent residence in America, but ever since that time have continued to be, and am now, in charge of the European business of the defendant, and since 1915 have made frequent trips to Germany and to other countries in Europe in

connection therewith. I have recently returned from Germany where, for several weeks, I was engaged in [351] conferences with the Federal Insurance Board of Germany and the Trustee appointed for defendant under the German Revaluation Law regarding the amount of the contribution or "Beitrag" to be assessed against the defendant by said Board and paid by defendant to said Trustee under said Revaluation Law.

As a result of the foregoing, and in connection therewith, I have become and have been for many years thoroughly familiar with the provisions of German law and the rulings of the German courts and German administrative authorities, relating to and regulating the conduct of the business and the operations of the defendant in Germany.

FACTS RELATING TO JURISDICTION AND GOVERNING LAW.

I have examined Policy No. 4648275 issued by the defendant about November 10, 1911, to Henry Heine, and upon which is based the first cause of action in the amended complaint of the plaintiff. The signatures of G. Nimptach, the Principal Attorney-in-fact or General Representative of defendant for Germany, and George K. Schlesier, Secretary for Germany for the defendant, were the last signatures affixed to the policy and were actual signatures written upon the policy in Germany by said persons, respectively. The policy was written entirely in the German language and was delivered

to the insured in Germany. At the time the insured made application to the defendant for said policy, and at the time said policy was issued, the insured was a resident in and subject of Germany, and has continued until the present time a citizen and resident of Germany, as affiant is informed and believes and avers the fact to be.

All payments called for by the policy, whether [352] premiums to be paid by the insured or sums to be paid to the insured or other beneficiary, were payable in "Mark D. Reg." This expression is an abbreviation for "Mark Deutscher Reichswaehrung," and translated into English reads "Mark in the Currency of the German Reich." All premiums were payable at the head office of the defendant in Berlin, or at the German office of the defendant situated nearest the residence of the insured, and all amounts payable to the insured or the beneficiary under the said policy were by its terms payable at the office of the defendant in Berlin, Germany.

The records of the defendant relating to this policy show that all premiums upon said policy were paid up to and including November 10, 1921, and that all of said premiums were paid at defendant's offices in Germany and were paid in the currency mentioned in the policy, to wit, marks for the nominal amount of marks therein mentioned, viz., N. 3,539 and for that amount only. Any premiums paid thereafter by the insured were paid to the German insurance company called Kronos hereinafter mentioned.

The policy contains a clause headed "Jurisdiction and Domicile Within the Country," and this vests in certain specified courts of Germany exclusive jurisdiction of all actions growing out of or based on the policy. This clause reads:

> "10.—JURISDICTION AND DOMICILE WITHIN THE COUNTRY.—For all lawsuits the Company, as Defendant, submits at the option of the Plaintiff, either to the jurisdiction of the Courts to which its Chief Representative for Germany is subject, or the Courts to which the General Representative for a given German Federal State is subject, if such representative has been appointed pursuant to §115 of the Law regarding Private Insurance Enterprises or to the jurisdiction of the Court to which the Germany Agency is subject, through which the insurance was issued. The Office of the General Representative for the German Reich in Berlin or the Office of the General Representative for a given German Federal State is to be considered [353] the domicile of the Company within the country, provided the latter has been appointed pursuant to §115 of the law regarding private insurance enterprises."

At the time said policy was applied for and issued the insured was engaged in business in and was a resident of Berlin, Germany, where the chief or principal office of the defendant in Germany was located, and where its chief representative for Germany resided, and to the courts of which he was subject, and ever since then the insured has

continued to reside in said Berlin, as affiant is informed and believes, and therefore avers the fact to be.

At the same time that the plaintiff made application for policy numbered 4648275 aforesaid, he made application for another and like policy, upon which the second cause of action set up in the amended complaint in this action is based, and at the same time and place and under like circumstances there was issued to him by the defendant its policy numbered 4648274, which is identical, except as to number, with the aforesaid policy numbered 4648275.

And at the same time that the plaintiff made application to the defendant for policy numbered 4648275 aforesaid, he made application to the defendant for a third policy in the sum of M. 200,000.00, upon which the third cause of action set up in the amended complaint in this action is based, and at the same time and place, and under the same circumstances as said policy numbered 4648275 was issued to the plaintiff, the defendant issued to the plaintiff its policy numbered 4648273, identical in all respects with said policy numbered 4648275 except as to number, principal sum, premiums, and table of loan, surrender and paid-up insurance values. With the exceptions [354] stated in this paragraph, all that has been said above with respect to policy numbered 4648275 is applicable to the other two policies.

At all times since 1904 defendant has maintained and now maintains and intends to continue to maintain in Germany a general representative

and attorney-in-fact appointed pursuant to the aforesaid § 115 of said laws of Germany Relating to Private Insurance Enterprises, and upon whom process issued out of any of the courts of Germany and directed to defendant might be served. During the past few years many hundreds of actions have been commenced in Germany against defendant upon mark policies issued by defendant in Germany. In substantially all of those actions service of process has been made upon defendant's general representative and attorney-in-fact in Germany. In no action commenced in Germany upon a mark policy issued in Germany has defendant sought to evade the jurisdiction of the German courts or to invalidate service made in Germany upon defendant's said representative in Germany. In all of said actions, i. e., upon mark policies issued by the defendant in Germany, the German courts have assumed jurisdiction (so far as any justiciable issue was presented therein) and those actions have either been disposed of or are still pending in the German courts.

Defendant for many years has owned a large office building in Berlin, Germany. This building has always been subject to the control of the German insurance authorities. The building is now being sold with the consent of the German Federal Board for Private Insurance, for approximately 1,750,000 Reichsmarks, and the proceeds arising from the sale will, under agreement with said Board, be deposited as received to the account of defendant's Revaluation Trustee in Germany. [355]

Notwithstanding the transfer of certain of its assets to Kronos, the defendant has at all times maintained, and still maintains in Germany, assets much more than sufficient to meet all lawful claims and demands of the plaintiff and all other claims on policies issued in Germany.

The defendant is organized under the laws of the State of New York, where it has its principal office and place of business. There are no witnesses to any of the transactions involved in this action resident in the State of Oregon. Practically all of the witnesses thereto reside in Germany and those who do not reside in Germany, are residents of the State of New York. None of the records of the defendant relating to any of said transactions are, or ever have been, in the State of Oregon. All of defendant's original date, correspondence and documents relating to defendant's business in Germany and policies issued there were kept in Germany and are still in Germany in the possession of the "Kronos" Life Insurance Company, hereinafter referred to, except when defendant is able to obtain them for use in connection with litigation in America upon said German policies. To defend this action in the courts of Oregon would impose upon the defendant great and unnecessary difficulty, inconvenience and expense.

The courts of Germany have at all times been, and now are, open and functioning, competent and ready to take jurisdiction of any justiciable controversy based upon or arising out of the policies upon which this action is based, or based upon or

arising out of any and all policies issued by the defendant in Germany. [356]

MATERIAL FACTS RELATING TO CONDUCT OF DEFENDANT'S BUSINESS IN GERMANY AND THE LAWS GOVERNING SAME.

In 1904 the defendant obtained a concession from the German Reich permitting it to transact an insurance business in Germany under the conditions therein prescribed. Prior to that time defendant had obtained concessions from various of the German states, but had obtained no general concession from the German Empire until November, 1904.

Under the provisions of its concession and of a German Imperial statute known as the German Law on Private Insurance of 1901, defendant was required to keep and did keep in Germany and under the control of the German government the full legal reserve for all policies issued in Germany (including the policies issued to Henry Heine hereinbefore mentioned), whether payable in marks or any other currency and whether issued on the life of a German or a person of any other nationality. By the term "full legal reserve" as used herein is meant the amount of assets deemed by the German Insurance Board, under the actuarial rules approved by it, to be sufficient to provide the funds necessary to meet at any given time all insurance obligations then outstanding on defendant's policies issued in Germany.

The aforesaid German law required that at all

times the reserves on all policies issued by the defendant in Germany be kept in certain securities therein specified, which, for brevity, may be broadly called "trust securities." Under Section 90 of said law, Nylic was required to maintain the full legal reserve for all its German policies in German mark securities under the control of the German Insurance Board, as stated in said section "so as to make it sure that no one can dispose of the fund without the consent of the Board." In addition the defendant was required to keep [357] invested in Germany, as further security for its German policies, a so-called "caution" fund, amounting to 2,000,000 marks. In compliance with said law and requirements, the full legal reserve for all policies issued by defendant in Germany was kept in Germany under the control of said Board invested in German Imperial, State and Municipal Bonds and in loans to holders of German insurance policies issued by defendant in Germany; and all of said bonds and loans were expressed in and were payable in Marks D. RWG.

Under said German law and the requirements of the German Insurance Board, the defendant was required to maintain in Germany said reserves and caution fund without regard to whether the net proceeds of the defendant's German business were sufficient to maintain the funds intact, and was also required to pay to its German insured the same rate of dividends the defendant paid to its American insured.

The defendant complied in every respect with all

of the aforementioned requirements. All premiums on policies issued by the defendant in Germany were used exclusively to create the German reserves above described and to pay expenses of the business in Germany and the loans, maturities, death claims and dividends on defendant's German business. None of said reserves were ever withdrawn by defendant from Germany and no profit or other net surplus was ever realized by defendant on any of its German business or withdrawn by defendant from Germany. On the contrary, in order to maintain the required German reserves, defendant was obliged to divert assets accumulated outside of Germany on non-German business and send said assets to Germany, because the German business not only failed to produce any surplus above the reserve, but failed to produce net assets sufficient to maintain the full German legal reserve, after paying dividends to the German insured [358] on the same basis as to the American insured, as required by German law. This loss on defendant's German business was largely due to the fact that the German securities in which defendant's German reserve was required under said law and regulations to be invested, paid a lower interest return than defendant's other securities and the fact that the expenses and mortality in Germany were unexpectedly high and were above the average elsewhere.

I wish to point out in this connection that during the four years of the war, the defendant experienced unexpected mortality losses in Germany inci-

dent to the war amounting to 5,845,508 marks, being claims directly traceable to war causes. The actual reserve on deposit to cover these war losses was only 1,100,000 marks, which left a net loss of 4,700,000 marks on account of war losses which had to be met through additional payments from the Company in New York. In addition to the above amount of 4,700,000 marks the defendant was obliged between August 10, 1914, and May 4, 1916, to send to its German office from its non-German assets, to cover depreciation in market value of German securities and other losses resulting from war conditions, a further amount of 6,907,000 marks, making a total of 11,607,000 marks contributed by defendant during the war from its non-German assets to make good losses on its German business. Of this sum 5,748,000 marks were sent during the early months of the war when the German mark was at a premium above the gold parity, thus costing the defendant a premium in dollars to buy the German exchange. Of the total amount transferred to Germany during the war, more than 5,000,000 marks was used for the purpose of purchasing additional bonds for deposit with the German authorities to cover premium reserve, and 1,800,000 marks to cover the depreciation in the market value of the securities forming [359] the premium reserve deposit.

Thus, in spite of war conditions, the defendant loyally fulfilled every obligation under its German policies, and every obligation as required by the German government, and made good to its Ger-

man insured all the losses covered by the terms of the concession and its policies in Germany.

In 1914, at the beginning of the World War, the defendant ceased to write new insurance in Germany, but continued to maintain its offices and representatives there for the transaction of all business relating to its then outstanding insurance. After the close of the World War defendant decided to discontinue all of its foreign business by transferring the same to domestic companies domiciled in the respective countries where such insurance had been written. In pursuance of such policy the defendant, as of December 31, 1921, with the consent and approval of the appropriate official body of the German government, and in due compliance with all of the provisions of German law and the regulations issued thereunder, transferred the major part of its assets in Germany to Kronos Deutsche Lebensversicherunga Aktiengesellschaft (a German insurance Company, herein for convenience usually called Kronos), and in like compliance with the provisions of the German law and with the consent and approval of the appropriate German officials, said Kronos assumed all of the liabilities of the defendant upon its German mark policies, including said policies of plaintiff Heine numbered 4648278–4–5, hereinbefore referred to, except as to certain classes of policies, few in number, not issued to or held by German citizens and residents or payable in German marks.

In connection with such assignment by the defendant and assumption of liability by Kronos, the

defendant transferred to Kronos, under the direction of the German [360] Insurance Board, its entire German premium reserve on all the transferred policies, as to which the said Kronos assumed all liability, including the policies issued to Henry Heine as aforesaid, said premium reserves consisting of cash, bonds of the German Reich and of the several constituent states thereof and municipalities, and obligations due the defendant from loans upon its German policies, all aggregating the sum of 114,590,678.09 marks; and in addition thereto the defendant transferred to Kronos, by direction of said Insurance Board and as required by German law, the additional "caution" fund of 2,000,000 marks described above, and also the further sum of 37,107,737.34 marks. The last-mentioned sum was equal to more than thirty-two per cent. (32%) of the entire premium reserve upon the defendant's transferred German policies, and was paid to the Kronos by defendant out of its non-German assets in order to meet the requirements of the German Insurance Board and to provide the Kronos with an extra contingent fund to better enable it to meet the obligations under the policies taken over by it.

It will be seen from the foregoing that the German insured of defendant have already had a very large participation in the defendant's non-German assets through the contributions made by the defendant from those assets to make good the loss on its German business and to maintain its German reserves intact. The German insured of defendant

have had a very large participation in the defendant's non-German assets through the annual reduction of premiums in Germany by the declaration of dividends based on the profits of the defendant's business outside of Germany. By these means defendant's German insured have had their insurance at much less than its actual cost to defendant. In other words they have already had their [361] insurance to a material extent at the cost of the defendant's non-German insured.

In addition to the foregoing, the defendant's German insured are to benefit further from the Company's non-German business and at the further expense of the Company's non-German insured, to the extent of upwards of $3,000,000, by the contribution or "Beitrag" hereinafter described, which the German Insurance Department has assessed against defendant and which defendant is now paying into the Revaluation Fund for the revalorization of defendant's German policies.

THE REVALORIZATION OF DEFENDANT'S POLICIES UNDER GERMAN LAW.

As has been stated in the affidavit of Dr. Arthur Burchard filed in this cause, the German government, on July 16, 1923, passed a law whereby certain classes of German creditors were granted some measure of relief from the great losses they had suffered from the tremendous depreciation of the German currency which followed the termination of the World War. Instead of being obliged to bear the full consequences of the depreciation of the

currency and to accept payment of their mark obligations at the ratio of one million million old marks to one of the new marks, certain classes of obligations were revalorized to some substantial extent. The ratios of revalorization were different as to different classes of obligations, and some kinds of obligations were not revalorized at all. Included among the classes or revalorized claims were those arising out of life insurance policies which had been issued by such insurance companies as were under the supervision of the German Federal Board for Private [362] Insurance. A detailed description of this law and its provisions, as they relate to defendant's German policies, is included in the aforesaid affidavit of Dr. Burchard, and it is referred to here only for clearness in connection with the following statement of facts concerning the official proceedings relating to defendant under said law.

The defendant at all times was, and now is, subject to the supervision and control of the German Federal Board for Private Insurance with respect to funds collected from premiums on policies, the disposition of all such funds, the general character of investments that might be made, and in all other respects relating to its German business and policies. On October 25, 1928, in accordance with the provisions of § 115 of the Decree of November 29, 1925, for carrying into effect the Revaluation Law of July 16, 1925, said German Federal Board for Private Insurance (constituted as provided by the laws of Germany) held and decided that defendant was a supervised insurance concern under the supervision of the Reich within

the meaning of said insurance and revaluation laws and the said Decree. (English translation of material portions of said Revaluation Law is attached to the affidavit of Dr. Arthur Burchard as Exhibit I, submitted herewith and English translation of certain material portions of said Decree of November 29, 1925, is attached to said Burchard affidavit as Exhibit J. English translation of said decision of the German Insurance Board is attached to said Burchard affidavit as Exhibit "K.")

Thereafter, and as provided by German law, an appeal was taken to a tribunal designated as the Appellate Division for said Insurance Board, and set up to hear such appeals. On February 15, 1929, said Appellate Division affirmed the decision of October 23, 1928, of the said German Insurance Board. (English translation of the decision of [363] said Appellate Division is annexed to said Burchard affidavit as Exhibit L.) The decision of said Appellate Division is final under the German law and no appeal can be taken therefrom.

Long prior to the commencement of this suit and the other suits on German policies in the courts of Oregon, a trustee for the defendant under the revaluation law aforesaid was appointed by the German Insurance Board, and said trustee has been at all times and is now functioning in accordance with the provisions of such law. Under said revaluation law the trustee has taken possession of all the reserves of the defendant's former German insurance policies transferred by it to Kronos and of the "caution" fund above described, and also the additional amounts paid by defendant to Kronos

in connection with such transfer and hereinbefore mentioned. Said reserves and additional amounts, together with the contribution or "Beitrag" hereinafter described, constitute the revaluation stock or fund to be applied by the trustee to the revalorization of defendant's German policies under said revaluation law. Additionally all other property of the defendant in Germany, including the aforementioned real estate, is under the control of the German Insurance Board.

For a considerable period of time discussions and negotiations were carried on between the defendant and the German government with regard to the amount of the above-mentioned contribution or "Beitrag" to be assessed against defendant and to be paid from its general funds to the revaluation stock or fund to be administered by the trustee under said revaluation laws for the sole and exclusive benefit of defendant's former German policy-holders, including plaintiff. On February 12, 1930, an [364] agreement was reached between the defendant and the German government, through the Federal (German) Insurance Board for Private Insurance, by the terms of which the defendant is assessed and is to contribute to the revaluation fund from its general assets—that is, its funds and property other than the premium reserves upon German insurance policies and other funds turned over by defendant to Kronos as stated before—an amount sufficient to provide for a revalorization equal to fifteen per cent. (15%) of the gold mark value of each insurance policy, including the above-mentioned policies issued to the

plaintiff. Attached hereto and marked Exhibit "A" is an English translation of said decision of February 12, 1920, of the German Federal Board for Private Insurance, in which said agreement and the basis and reasons thereof, are stated.

It is the purpose and avowed intention of defendant to comply fully and specifically in all respects with the provisions of said Revaluation Law, the decisions of the German courts regarding same, the decrees of the German Insurance Department thereunder and the regulations and requirements of defendant's said Revaluation Trustee in carrying out said law. In that connection defendant has already deposited to the credit of said Trustee in Germany 3,000,000 Reichsmarks and under agreement with said Trustee will continue to deposit to the credit of said Trustee in Germany 1,000,000 Reichsmarks per month until defendant's assessment or contribution quota under said Revaluation Law as fixed by said decision of February 12, 1930, has been fully met. The total amount to be paid by defendant to said German Revaluation Fund under said Decision and Agreement of February 12, 1930, cannot be definitely stated until all claims thereunder have been marshalled and liquidated by the Trustee, but it is certain that said contribution [365] to be paid by defendant thereunder will amount to upwards of $3,000,000. Said Trustee has already commenced to administer his duties under said Revaluation Law. He has taken possession of defendant's former assets in Germany, as well as the assets of said Kronos. He has

promulgated rules for the carrying out of said Revaluation Law. Said rules have not as yet been formally approved by the German Insurance Department but I am informed that such formal approval will shortly be forthcoming. No actual payments to any of defendant's former German policyholders have as yet been made under said Revaluation Law by said Trustee but I am informed and believe that said payments will commence as soon as said rules have been formally approved by said German Insurance Board. I annex hereto as Exhibit "B" English translation of said rules as promulgated by said Trustee.

I also annex hereto as Exhibit "C" translation of an excerpt from an article in the "Frankfurter Nachrichten" of April 1, 1930, which accurately states, I am informed and believe, the percentage of the gold mark reserve value of the claims of the various insurance companies operating in Germany prior to the collapse of the German mark currency which will be realized by the policy-holders of such companies respectively under the Revaluation Law as administered in Germany. It will be noted that the former German policy-holders of defendant will receive a substantially larger percentage of their claims than will the policy-holders of most of the other of such companies.

I am advised by several German lawyers of the highest professional standing and ability that, outside of the provisions of said revaluation law and the fund thereby set up, including said contribution from the general funds of the defendant, noth-

ing whatever is lawfully [366] recoverable by the plaintiff or by any of the former German policy-holders of the defendant in any proceeding in Germany, judicial or administrative, other than possibly the technical legal right to recover the value of the number of "D. RWG." Marks called for by the policy, converted into Reichsmarks on the basis or ratio of one of the latter to one million million of the former. The revaluation law and the Decree of November 29, aforesaid, instead of impairing or diminishing the legal or contract rights of the policy-holders, and other holders of obligations falling within the provisions of said law and decree, provides a fund and an administrative method which enables them to obtain a substantial revalorization of their policies, instead of the merely nominal sum which would alone be recoverable in judicial proceedings.

FACTS CONCERNING THE PROSECUTION OF THESE CASES AND SIMILAR CASES IN OREGON.

Prior to the beginning of the World War four large American life insurance companies transacted a life insurance business in Germany. Some of those companies continued to transact business there for several years after the beginning of the World War. These companies, in addition to the defendant were (a) The Guardian Life Insurance Company of America (formerly called Germania); (b) The Mutaul Life Insurance Company of New York; and (c) The Equitable Life Insurance Society of the United States, each organized under

the laws of and having its principal office in New York.

I am informed and verily believe that at the present time there are outstanding approximately 28,000 policies issued by the said life insurance companies, including the defendant, in Germany and payable in German marks of the kind specified in the policy upon which this [367] action is based.

For several years last past there has been conducted, and is still being conducted in Germany, by attorneys and associations of present and/or former policy-holders of said four insurance companies, a vigorous campaign to secure control and/or representation of said policies of insurance for the purpose of commencing proceedings before the courts of Oregon and other states, for the purpose of endeavoring to recover judgments upon those policies in American courts or to harass defendant and said other insurance companies sufficiently to secure a settlement of such claims. Pursuant to this campaign many policies of insurance issued by the defendant in Germany and payable in marks have been assigned to various persons for the purpose of bringing actions in the American courts, and particularly have many assignments been made to Paul Herrmann, a citizen and resident of Germany, who has already brought actions in the courts of Oregon as alleged assignee upon a large number of policies issued by the defendant in Germany to German citizens, and payable in German marks. I am informed and believe and therefore aver that under the terms upon which said claims are soli-

cited for prosecution in American courts, and under the terms of said assignments, it is provided that attorneys prosecuting such claims before American courts shall take and prosecute said suits and actions only upon a contingent fee basis. Said claims have been obtained for prosecution in American courts upon statements and representations that a much larger recovery can possibly be had in the American courts than from German courts or German administrative bodies.

It is of moment in this connection to note that the courts of the home jurisdiction of defendant, and of [368] the other American insurance companies which did a life insurance business in Germany, to wit, those of the State of New York, have dismissed two actions brought against defendant upon mark policies issued in Germany (see Higgins vs. New York Life Insurance Company, 222 N. Y. Supplement 819 (4); also Von Niessen-Stone vs. New York Life Insurance Company, decided New York App. Term, First Dept. June 30, 1927). Those actions were similar to the suits now pending in Oregon and the motions upon which those actions were dismissed were identical with the motions in which this affidavit is presented. In the New York suits aforementioned, the New York courts declined to entertain jurisdiction of suits on German policies and remitted the litigants to their rights under the German administrative procedure. Those two New York actions are the only actions where the question of jurisdiction as raised herein of suits upon German mark insurance policies has been presented in this country, and counsel inform me that

there are no instances, either in the courts of New York or those of any other American state, where jurisdiction has been retained when the question of jurisdiction was raised as it has been raised herein.

It is probable that if the courts of Oregon accept and retain jurisdiction over this action and similar actions now pending therein, these courts will be flooded with thousands of actions upon German mark policies.

THE FACTS SHOWING THAT THERE IS NO EQUITY IN THESE GERMAN CLAIMS.

I am advised by counsel for the defendant that the motion under which this affidavit is submitted presents three main contentions:—first, that by the express terms of the policies only the courts of Germany have jurisdiction [369] of claims arising thereon; second, that even if the American courts had jurisdiction of such claims, they would not exercise it because (a) the policies are governed by German law and under that law no recovery can be had in the courts since revalorization is a purely administrative proceeding, and (b) even if the policies were governed by American law, that law recognizes no revalorization and nothing substantial would be recoverable because of the complete depreciation of the German currency; and third, that even if the courts of Oregon had jurisdiction they should not exercise it because there is no equity in the plaintiff's claims and no just reason for the prosecution of them in courts so far removed from the jurisdiction where they arose and the jurisdiction of the defendant's domicile.

In order that the court may understand the complete injustice of these claims and the reasons of equity as well as of law which have led the defendant to ask the court not to entertain them, I make the following statement of the facts material to this phase of the case:

The defendant is a purely mutual company. It has no stockholders and no capital funds and all its assets and earnings are equitably the property of the insured. Since a mutual insurance company has no assets which do not belong to its policy-holders, it makes no profits in relation to them. Its sole function is to provide them with the protection defined by the terms of their policies at the actual cost thereof. After providing the reserve and contingency funds therefor from its premium receipts and the earnings thereon, and paying the expenses of conducting its business, it returns to its policy-holders in dividends all the remainder of the funds contributed by them, with all earnings thereon.

Under the principles of mutuality, as accepted and applied in the insurance business and by insurance [370] authorities throughout the world, it is recognized that a mutual insurance company is essentially a trustee for the various groups of its policy-holders and that it should deal equally and fairly between them and should have no favorites among them. It should not discriminate against one group in favor of any other group. In this particular, one of the cardinal principles to be observed is that a mutual company must endeavor to conduct its business so that each group of its policy-holders shall pay the full cost of their own

insurance. And conversely, no group of policy-holders has any right to expect or demand that it shall obtain its insurance for less than the cost to the company of carrying it, because thereby another group of policy-holders would be required to pay more than the cost of carrying its insurance in order to make up the deficit occasioned by the favors granted to the first group. If, indeed, the Company has executed contracts which produce such a result because of error in the Company's calculations or because of unanticipated eventualities, and there has thus been brought about a situation whereby one group of policy-holders can obtain the protection called for by the terms of its policies only at the expense of the remaining policy-holders of the Company, who are thereby required to bear more than the cost of their own insurance, the courts would of course enforce the terms of the policies issued to the favored group, because it is deemed that the Company is the agent of each group of its policy-holders and that they are bound by the contracts it has made. The favored group has the legal right to enforce the terms of its contracts, but the letter of the contract is the limit of the right, and the favored group has no equitable claim which would entitle it to further invade the funds contributed by the other policy-holders [371] of the Company, in order to recoup itself for losses it was not insured against. No matter what the uninsured misfortunes of such a group may be, the Company has no right to assuage them out of funds contributed by and equitably belonging to its other policy-holders, and if demands for such contribu-

tions are made, it is the duty of the Company, in its capacity as trustee for each group of its policy-holders, to resist such demands.

The foregoing is the precise situation presented in these cases now being prosecuted in the courts of Oregon. The Company has scrupulously fulfilled every obligation imposed by the terms of its concession in Germany and by the provisions of the policies it issued there. In order to do so, as has been shown above, it was obliged, before the revaluation law was passed, to contribute to its German policy-holders more than 48,000,000 marks out of assets contributed by and equitably belonging to its non-German policy-holders, and since the revaluation law was passed it has been obliged to contribute to the German policy-holders, under the terms of that law, an additional sum of more than $3,000,000, also out of assets equitably belonging to its non-German policy-holders. The foregoing contributions have completely fulfilled every legal claim of the German policy-holders under both German and American law, and they more than fulfil every moral claim of the German policy-holders under any principle of fairness or justice which can be applied to this case.

Notwithstanding the foregoing considerations, the plaintiffs in these suits are now demanding additional sums from the defendant's American policy-holders, beyond the terms of their contracts and beyond the relief to which the German courts and administrative authorities have held they were entitled. Having had full protection, at the expense of the non-German policy-holders, for every loss

against which they were insured, they now demand recompense, at the [372] expense of the American policy-holders, for the losses due to the depreciation of the German currency, losses against which they were not insured. These suits are essentially, therefore, suits in which the plaintiffs, citizens and residents of Germany, ask the courts of a jurisdiction as far removed as possible from Germany to compel the American policy-holders of defendant to indemnify the German policy-holders against the losses they have sustained because of the depreciation of the German currency and because of the laws of the German government as construed by the German courts.

The gross injustice of this demand and the lack of any legal or equitable basis for it are further shown by the following facts:

The commonly accepted principles of mutuality as bearing upon the business of a mutual insurance company were internationally well established long prior to 1904 when the German Imperial Government granted the defendant the concession under the German Insurance Law of 1901 to do business in Germany. These principles were known and recognized by the German Insurance Board. Such Board knew that the defendant was a purely mutual company, subject to the limitations imposed by the settled principles of mutuality.

In 1904 the German authorities knew and recognized that there is no device by which all the national groups of policy-holders of an international insurance company can be protected against the consequences of the depreciation of their national

currencies, so that each may get the full gold value, or any specified part of the full gold value, of the currencies in which their policies are expressed. Each group must either take the risk of the depreciation of its own currency, or take the risk of the depreciation of the currencies in which the [373] Company's assets as a whole are invested. It would be obviously and grossly unjust for any national group to demand that its insurance contracts be so arranged that it would profit at the expense of the rest of the policy-holders in either event, so that if its own national currency appreciated in relation to the other currencies the policies of this group would be paid in their own national currency, whereas if that currency depreciated in relation to the other currencies, their policies would be paid on the basis of the higher value of the other currencies. Such an arrangement would have been so grossly one-sided and unfair that the German insurance authorities did not demand it, and if they had demanded it, their demand would have been instantly rejected by the defendant and by the Insurance Department of the State of New York, which has final control over defendant and the terms and conditions of the insurance business it is permitted to undertake. Nevertheless, if the demands of the plaintiffs in these suits should be granted, that is precisely the arrangement which would be imposed on the defendant and its non-German insured, in spite of the fact that no such guaranty or undertaking is contained in the policies as other obligations of the defendant. Under such an arrangement the Company's German insured would be set

apart as a specially favored group enjoying a special protection that was guaranteed to them and denied to all other policy-holders. This would be a complete negation of the principle of mutuality and under it the defendant would have become not a mutual insurance company but a company [374] for the special protection of the German insured at the expense of the non-German insured.

Confronted with this situation in 1904 when the defendant was admitted to business in Germany and the terms of its policies were prescribed, the German authorities recognized that they must choose either the risk of having their policies subject to the possible depreciation of the German currency or the risk of having them subject to the possible depreciation of the currency in which the defendant's non-German assets were invested. The German government in behalf of its German insured, chose the former of these alternatives, and the Company in behalf of its non-German insured was thereby obliged to accept the latter alternative. There is no principle of equity or justice recognized by insurance authorities or, as I am advised, by any court, under which the German insured can now ask the Company's non-German insured to make good the loss to the German insured which has resulted from this choice, but nevertheless that is exactly what their counsel are now demanding in Oregon.

No guaranty of the stability of the German mark currency, in which the defendant's German insured chose to have their policies payable, was ever given by the defendant; or for that matter demanded by

the German government on behalf of the defendant's German insured. If demanded, such guaranty would have been refused by defendant and in any event would not have been permitted by the insurance authorities of the State of New York to whose jurisdiction the defendant was and is primarily subject. In fact no one, until the catastrophic depreciation of the German mark had actually happened after the World War, ever thought any guaranty of the stability of the German mark currency was needed. [375]

This choice of the German government that the defendant's German policies be subject to the risk (then regarded as negligible) of the depreciation of the German currency rather than the depreciation of the American dollar or other non-German currencies, was effectuated by the requirement of the German law already mentioned that the defendant maintain in Germany the full legal reserve fund for all its German policies and in addition a special caution fund, these funds to be more than sufficient to discharge the defendant's full legal liability under its German policies and to be subject to the control of the German Insurance Board so that they could not be disposed of without the Board's consent, and to be invested in the prescribed classes of German mark securities. These special and separate German reserve funds were, of course, required for the special protection of the German insured. In order to make it sure that the defendant's German insured would be paid the marks called for by their policies, the German government required the defendant to keep its full German reserve and

caution funds intact even though the net assets contributed by the German insured were not sufficient to maintain these funds. The defendant loyally fulfilled all the terms of those requirements, notwithstanding the fact that in order to do so it had to take from the assets contributed by its non-German insured, funds sufficient to make good the loss on the German business. The requirement that the German reserve and caution funds must be invested in mark securities of the character prescribed by the German government and must be held at all times under the control of German authorities, made the German policy-holders secure against any waste of the Company's assets, either German or non-German, and against the effects of any depreciation of the non-German currencies in which the [376] Company's non-German assets were invested. The German government thus made it sure that if marks appreciated in terms of other currencies, the German insured would have special protection and the Company would always be able to pay them mark for mark of their policies. It cannot be doubted that if the present currency situation were reversed and if the defendant's non-German assets had depreciated to the point where they were practically worthless, by reason of their having been expressed in non-German currency, and if the German mark had remained stable so that the defendant's German assets had retained their full gold value, and if the defendant's non-German insured had thereupon sought to participate in the German assets, the German Insurance Board and the German Courts would have denied them such

participation. The German authorities would then have rightfully declared that according to the terms upon which the defendant was admitted to do business in Germany, the German assets were held for the special benefit and protection of the German insured, and that the German law had required that this reserve must be invested in German mark securities under the control of the German Insurance Board for the very purpose of preserving those assets intact for the German insured, so that they might be secured against waste of the company's assets elsewhere, and against the depreciation of the currencies in which the Company's non-German assets were invested.

The fact should not be overlooked, in any consideration of the moral aspect of these demands of the German insured against the American insured, that it was this special condition imposed by the German government for the benefit of the German insured which has resulted in the loss against which the German insured complain, and which they now seek by indirection to impose upon the American insured. The requirement that the defendant invest its German reserve in German securities not only resulted in [377] increasing the cost of the insurance to the Company by reason of the low interest return on such securities, but it made it certain that loss would result if the German currency depreciated, just as it made it certain that profit and security would result to the German policyholders if the German currency appreciated in relation to the currencies in which the defendant's non-German assets were invested. Having enjoyed

the security that would have resulted to them from this arrangement if the German currency had appreciated, the German policy-holders cannot equitably demand that the non-German policy-holders shall, from the funds they have contributed, pay enough to the German policy-holders to make good the loss which has resulted from the depreciation of the German currency. And there is no legal basis for such a demand, because defendant's German policies were expressed to be payable in marks, they contained no guaranty, express or implied, of the stability of the German currency, and there is no support in the law of Germany, which governs these contracts, or in the law of the United States, if it were applicable, for any recovery under them, except that provided by the administrative revalorization proceedings in Germany.

No actual revalorization has ever been effected of any of the German government mark securities in which all of the defendant's German assets (including reserves and caution funds) were invested. Those securities have [378] depreciated side by side along with the German mark. They have depreciated to a far greater extent than have the policies issued by the defendant in Germany, because those policies have been made subject to revalorization by the Revaluation Law of Germany, under which, largely of course by virtue of the contribution of more than three millions of dollars which the defendant is making for its non-German assets to that fund, the holders of such policies will receive approximately fifteen per cent. (15%) of the gold parity value of those obligations. It is true that a

German law has been enacted providing for a theoretical and future revalorization of German government securities expressed in marks but that law has not gone into effect and no actual revalorization of those securities has been provided for, and I may state that it is the positive, unquestioned opinion of statesmen and financiers acquainted with the German situation that no revalorization or payment will ever be made or is in fact possible on German government mark securities. If, however, any substantial revalorization of those securities should be effected, it will, of course, be reflected in a corresponding appreciation of the revaluation stock now being administered by the German trustee for the benefit of defendant's German policy-holders, since all those securities are now in his possession.

It will be seen from all of the foregoing that these suits now being prosecuted in the courts of Oregon amount, in effect, to a demand by the German policy-holders of the defendant that its American policy-holders shall be required to make good to them the losses they have suffered by reason of the terms of the contracts imposed upon the defendant by the German government for the benefit of its [379] German insured, and by reason of the failure of the German government to revalorize the securities in which it required the defendant to invest its German reserves. The German courts and the German insurance authorities have repudiated these demands as inequitable and unlawful, and I know of no principle of law or justice under which they can be sustained. For that reason the defend-

ant, in behalf of its American insured, must resist these claims in whatever tribunal they are asserted, and it believes that the courts of America should not entertain jurisdiction of them.

(Signed) WALKER BUCKNER.

Subscribed and sworn to before me, this 31st day of May, 1930.

[Seal] (Signed) CLARA M. SWANSON,
Notary Public. [380]

EXHIBIT "A."

In the Name of the Reich.

In the Cause of the
New York Life Insurance Company in New York.

The Federal Insurance Department for Private Insurance, in Senate session on 12th February, 1930, at which were present:

1. the director of the Federal Insurance Department for Private Insurance, Geheimer Regierungsrat Becker, as Chairman,
2. the Regierungsrat Dr. Wirth and
3. the Regierungsrat Dr. Kühne,

as permanent members,

4. the director general of the Gotha Life Insurance Bank, Geheimer Regierungsrat Dr. Samwer and
5. the director general of the Allianz and Stuttgarter Verein, Insurance Stock Company, Dr. Schmitt,

of the insurance advisory board,

after verbal deliberations, rendered the following decision:

"To assess the 'New York' Life Insurance Company with such a contribution from its other property, in accordance with article 100 of the Enforcement Ordinance of 29th November, 1925, of the Revaluation Law (Reichs Law Journal I, page 392), as is necessary for enabling a revaluation of 15% of the gold-mark value of each single insurance per 1. January 1930."

FACTS.

By Senate decision on 25th October 1928 the Federal Insurance Department declared that the "New York" Life Insurance Company (New York Lebensversicherungs Gesellschaft) has to be considered an enterprise supervised by the [381] "Reich" in the sense of art. 115 of the Enforcement Ordinance of 29th November 1925 of the Revaluation Law (Reichs Law, Journal I, page 392). The appeal lodged against this decision by the Trustee got dismissed by appeal decision of 13th February 1929 (publications of the Federal Insurance Department for Private Insurance, 1929, page 95).

The goldmark reserve, which according to art. 96 of the Enforcement Ordinance of the Revaluation Law has to serve as basis for the revaluation, gets estimated by the Trustee of the "New York" at approximately 100 million Reichsmark. The existing revaluation stock, now managed by the Trustee of the Mannheimer Lebensversicherungs Bank A. G. represents a value of about 1,8 million Reichsmark. The revaluation stock, which in proportion to the gold mark reserve is but small, makes only a very moderate revaluation possible

(about 1,6 to 1,8% of the goldmark reserve). An increase to any material extent of the revaluation depends therefore upon the amount of contribution the company will have to pay from its other property. In regard to this contribution art. 100 sentence 1 of the Enforcement Ordinance of the Revaluation Law decrees as follows:

> "If the economical conditions of an enterprise make it seem adequate, then at demand and in accordance with particularized definition of the Federal Insurance Department, a contribution must get paid into the Revaluation stock from the other property of the enterprise."

According to art. 101 sect. 3 the contribution will get fixed by the supervising authority, excluding judicial proceedings, by a procedure put down in §§ 73, 74 and 84 of the Insurance Supervision Law.

In regard to the amount of contribution payable by the "New York" negotiations have been going on [382] since July, 1926. On 13th July, 1926, and 24th July, 1928, the question of contribution payment was discussed verbally in the Federal Insurance Department with the Vice-President of the company, Mr. Walker Buckner. In the discussions of 24th July, 1928, the President of the Federal Insurance Department occupied the position that in regard to the "New York" a revaluation quota must get reached which will stand comparison with the revaluation quotas of the favorably rating up German companies. The representative

of the "New York" has in the course of these discussions held out the prospect of a contribution payment; but neither at this meeting nor in the several further meetings with the chief representative of the company was a precise offer in figures attainable. When in fall, 1929, about six months after the appeal decision of 13th February, 1929, no definite offer by the company had yet been received, the Insurance Department had the feeling that they ought to give up further negotiations with the company in regard to the contribution and rather procure a Senate decision in accordance with art. 101, sect. 3, of the Enforcement Ordinance of the Revaluation Law. The Senate session, which had been planned for end of October, 1929, was for the present suspended. Because the "New York" had asked through the diplomatic channel to be granted a further opportunity, in verbal negotiations between a representative of the company and the competent German authority to demonstrate its fundamental opinion regarding the payment of a contribution. At this occasion it became known to the Federal Insurance Department that the Superintendent of the Insurance Office of the State of New York, in letter dated 24th September, 1929, had informed the company of his standpoint in regard to the principles which must get [383] observed in respect to the payment of a contribution. In this letter, which at the request of the Federal Insurance Department the "New York" had submitted in the English wording as well as in German translation, the whole development of the German business of the

"New York" was, in short sentences, concisely outlined and in regard to the contribution the following statements were made:

> "After reviewing all the history and all the circumstances of the situation, I write this letter to inform your company that any contribution which in its judgment it feels justified in making in pursuance of a right to claim any contribution under German law must take into consideration that such contribution must not infringe on the rights of American and other policy-holders of the Company, and must be on some justified basis or formula. It is most certain that there would be no justification for the German Insurance Department to make an assessment simply on the ground that the New York Life is a large company and has large resources. Furthermore, there could be no justification based on the condition of the company at the present time. The only basis would be the condition of the company as of the year 1921, the last year when the German business was on the books of the company.
>
> We would see no objection, if it is in compliance with German law, to the company taking into consideration as a contribution such proportion of the contingency reserve as the company may have had at the end of the year 1921 as the reserves on the entire German business bore to the total reserves of the company at the end of that year. [384]

> Anything beyond this basis would be to take away something rightfully belonging to other policy-holders of the company, which we do not feel is justifiable."

The verbal discussions with the Vice-President of the company, Mr. Buckner, which the "New York" had desired, took place in the beginning of February, 1930. In the course of these negotiations the attempt was made to find a basis for the contribution assessment by the Senate of the Federal Insurance Department. The participating members of the Federal Insurance Department and the Trustee claimed it to be in the interest of the insured to fix a certain revaluation rate and not to decide upon the payment by the company of a certain sum. For, on account of the existing great number of insured, the final determination of the goldmark reserves would still require considerable time, and therefore the insured, if payment by the company of a sum would be decided upon, would remain still for a long time in ignorance of the amount of their revaluation claim, and for the present only part payments of the revaluation portions could be made to the,—in round figures, —12,000 insured entitled to revaluation. Whereas, if a revaluation rate gets fixed, the Trustee can, without delay, begin with the calculation of the individual claims and can make payment of the revaluation portions in full to each insured at once. After some scruples in the beginning, Vice-President Buckner finally agreed to this way of fixing the contribution. However, by referring to

the letter of the Insurance Department of the State of New York of 24th September, 1929, he vindicated that as basis of the calculation should be taken the assets of the company as shown at the end of 1921, because at the end of that year the German business of the company had been transferred to the "Kronos." The [385] German business of the "New York" had amounted at that time to 3,63% of the total business. The "New York" would be ready to pay as contribution from its other property for the revaluation of the German Mark insurances out of the total contingency reserves per end of 1921 a portion corresponding to the German share in the total business. The result of the intricate negotiations carried on by both parties with full appreciation of the difficulties was, that Vice-President Buckner, in the name of the company, declared his agreement to pay such amount of contribution as will enable a revaluation of 15% of the gold mark value of each individual insurance per 1 January, 1930. Moreover it was agreed upon in these negotiations that the "New York" will grant, in addition to this revaluation rate calculated for the 1st of January, 1930, 5% interest since 1 January, 1930. Furthermore it was arranged that, deviating from articles 103, 104 of the Enforcement Ordinance of the Revaluation Law, no new insurances should get calculated, but that the revaluation portions shall be paid in cash.

The plan discussed with Vice-President Buckner by the Trustee and the partaking members of the Federal Insurance Department, and approved by

cable by the competent organs of the "New York" and by the supervising authority, was carried forward by the spokesman in the verbal negotiations before the Senate.

The special representatives of the insured who next to the Trustee had been admitted to partake in the verbal discussions, in the first place acknowledged German law to be applicable, but then, repeating their former motions to the Insurance Department which by this Department had been intimated to the Chief representative of the "New [386] York," they declared this revaluation to be too insignificant, and further contended in substance as follows:—It is true that the General Representative of the "Reichsgemeinchaft Amerikanischer Versicherter," as has correctly been stated by the spokesman in conferences in the Federal Insurance Department, the last time on 30th November, 1928, had declared a revaluation of 10—15% satisfactory. But this opinion was thrown over again on account of a different judging of the situation caused by a better turning out of the revaluation with the German companies and a more favorable attitude, in the sense of the insured, of the German and American courts, —here special reference is taken to judgments re Russian Rouble insurances. The contribution payable by the company ought at least to get fixed at 40 million RM, but should not, as provided for in the plan, read for a quota. A contribution of such amount would bring about a revaluation of 50% because one would have to count on the cancellation of a larger number of the insurance claims

on account of loss of the insurance policies or for other reasons. The German Mark insured of the "New York" had claim to an especially high revaluation for the following reasons: The company, in its prospectuses, one of which was read aloud, had always pointed to its being a mutual company, to its being responsible with its total assets and to its transacting a large business all over the world. The insured, when entering into the contracts, had been influenced by the considerations that in case of economical, financial or political complications, wars or epidemics, their interests would be better protected by a great foreign company than by domestic companies. The "New York" had made considerably better settlements with Russian Rouble insured than it now intends to carry through with the German Mark insured. The assets of the Company represented at present 1½ [387] billion dollars. In determining the contribution there should be taken into account the present assets of the company and not the assets at the end of 1921.

The representatives of the "New York" stated in reply, that decisive for the revaluation quota could only be the correct interpretation of art. 100 of the Enforcement Ordinance of the Revaluation Law. From the propaganda material of the "New York" nothing could be deduced respecting the determination of a high revaluation rate. For as long as the Company had transacted new business in the German Empire there had never been any question of a depreciation of the Mark. Of the Russian Rouble insured only a very small portion

had been settled, namely only the policies of such insured who were neither domiciled in Soviet Russia nor owned Soviet Russia citizenship. Besides the "New York" had the right to expect at the time of the conclusion of a trade agreement with the United States of America to attain refund by Soviet Russia of the values the Soviet Government had taken away from the "New York" in Russia; for this reason the "New York" had caused the claims on refund to be assigned to it by the holders of the meanwhile settled policies. In other countries with sinking currency, f. i. France, no revaluation had been called for. A higher contribution than that which had been submitted to the Senate for its decision, namely 15%, could not get granted without infringing on the rights of the other "New York" insured.

The Trustee of the "New York" stated that the interests of the insured, among whom there were many in needy circumstances, in special also many holders of annuity insurances, would demand an immediate assessment of the contribution. A revaluation in an extent of 15% plus [388] 5% interest since 1 January, 1930, appears to be all that is attainable in view of the situation and in accordance with the negotiations with the "New York." The fixing of a revaluation rate would be of more advantage for the insured than the determination of a sum payable by the company. The principles on which stress was laid by the Superintendent of the Insurance Supervision Office of the State of New York, that the status of the Company's assets at the end of 1921 must be taken

as basis, appears to be justified. Because it was a generally acknowledged principle that every insured, when withdrawing from an insurance contract, can only receive that portion of the free reserves which correspond with his share in the total assets. If the Senate would decline the revaluation rate of 15%, arrived at in the preceding negotiations, as too low, then a very precarious legal situation would get created for the insured. Above all it would then be more than doubtful if the insured, by litigation before American courts, would, in a nearer future, gain results of any account.

REASONS.

In conformity with the parties the Senate agreed German Law to be applicable. For from the fact that the "New York" is to be considered an enterprise supervised by the Reich it follows, that the Mark insurances belonging to the German insurance business of the "New York" must be rated up in accordance with §§ 59–61 of the Revaluation Law and art. 95–114 of the Enforcement Ordinance (see also judgment of the Reichsgericht of 13th December, 1929—VII 202/1929). Therefore the question how the "New York" treats the Rouble insured must entirely be left out of consideration, the more so as the situation of the Russian Rouble [389] insurances is quite different from that of the German Mark insurances. In the same manner also the question must be left undiscussed what the prospects of the German Mark insured would be if they were asserting their claims before American

courts. In this respect it may be right to just mention that according to authentic information received in the Insurance Department from a trustworthy source the prospects of such litigation carried before American courts must be termed absolutely unfavorable.

In regard to the question whether an attainable revaluation rate or a sum payable by the company shall be taken as basis for the contribution assessment, the Senate has thought best to give preference to the assessment of a revaluation rate, because by a regulation in this manner the settlement of the individual claims could more quickly get started and carried through and would furnish within a short time cash payments to the insured. The anxiety on the part of the representatives of the "Reichsgemeinchaft Amerikanischer Versicherter," that a good many of the insured would not give notice of their claims and that in consequence thereof, when a revaluation rate (instead of a sum) gets fixed, the "New York" would gain an unjustified advantage, the Senate could not share. The insured entitled to revaluation are mostly known through the existing files and records. Therefore in by far the greatest number of cases the Trustee will be in the position to find out the insured who are entitled to revaluation. Moreover, the insurances of the "New York" read mostly for larger amounts: the average gold mark reserve amounts to M. 8,000. Besides this, the revaluation of this company has during a number of years been the topic of public discussion. Therefore it is hardly to be supposed that not all insured

will come forward with their justified [390] claims of their own accord.

The Senate assesses the contribution after conscientious consideration and not arbitrarily. The demand that the company shall make a particularly high contribution cannot get sufficiently justified by referring to the billion assets of the company. Because the billion assets are balanced by billion liabilities. For the payment of the contribution can only be taken into account the free assets and not the assets of the company which are bound by liabilities.

The question, whether in deciding upon the contribution the present status of the assets ought to be taken as basis, or the status at the end of 1921, may be left open. In any case, in the verbal negotiations, which took place between the Trustee, several members of the Insurance Department and the Vice-President of the Company, Mr. Buckner, a result was reached which must be termed acceptable and serviceable to the interests of the insured. It is true that it remains behind the high expectations of the insured, who were pitched up by the active propaganda of the associations, which latter—this only a by-the-way remark—had conditioned for themselves quite a considerable "success-honorary," but it anyhow reached and even exceeds the revaluation quota which these associations had originally declared sufficient. The quota assessed by the Senate corresponds with and in many instances even exceeds the revaluation rates of the number of the German Companies. It burdens the "New York," whose revalua-

tion stock is exceedingly low in consequence of its having invested its premium reserves exclusively in bonds, with a considerable sacrifice. Besides, the contribution, which the "New York" has in this manner to pay, exceeds, in respect to amount, by many million Reichsmark the amounts fixed so far for domestic and foreign insurance enterprises. [391] In considering the proportion between the existing revaluation stock and the payment with which the company gets charged by the assessed contribution, one can but term the result a favorable one. The so far existing revaluation stock made a revaluation of at most only 1,8% of the goldmark reserve possible. By the contribution which the company has to pay the revaluation rate gets increased more than sevenfold.

Although the free resolution of the Senate was not interfered with by the position taken by the American supervising authority, the declaration of the "New York" could not remain unnoticed, that larger payments would not be compatible with the interests of the totality of its insured and would not be tolerated by the American supervising authority. Although the Senate has not decided the question of the liability of the "New York" resulting from its prospectuses, it notwithstanding considers the interpretation by many of the insured wrong. If it were otherwise, the "New York" would have accepted the currency risk, what has by no means been its intention.

In view of all this, the Senate could not take upon itself the responsibility to disagree with a solution reached in long negotiations, recommended

also by the Trustee, by which the existing revaluation stock gets increased to more than seven times its present amount.

Therefore the decision as indicated above had to be rendered.

THE FEDERAL INSURANCE DEPARTMENT.

Signed: Dr. WIRTH.

II 16/187 [392]

EXHIBIT "B."

Distribution Plan

for the life insurance policies of the New York Life Insurance Company which have to get rated up in accordance with the German Revaluation Law of 16th July 1925.

I. Insurance entitled to Revaluation

1. There have to get rated up the claims from capital and annuity insurance contracts having for object the payment of a fixed amount in Marks and having been closed with the "New York" before 14th February 1924 insofar as
   a) the insurance was in force on 14th February 1924, or
   b) the due payments have been accepted by the drawees with reservation or within the period from 15th June 1922 to 14th February 1924 (retroactive period), or
   c) the payments became due before 14th February 1924 but have not yet been settled.

2. There will furthermore get rated up the claims arising from accumulation dividends, as far as the principal claim has to get rated up in accordance with section 1.*)

II. Rules of the Revaluation.

1. As basis for the calculation of the revaluation portion of the principal claim (I, 1) must be considered the goldmark reserve falling to the share of each single insurance. This reserve gets calculated in accordance with the principles approved by the Federal Insurance Department for Private Insurance.
2. Premium advance payments get added to the gold mark reserve with the gold mark value on the day when they were paid in. Payments, especially loans, which were contracted before February 1924, get charged against the goldmark reserve with the goldmark value on the payday after deduction of the gold value of eventual reimbursements.
3. As basis for the calculation of the revaluation portion arising from the accumulation dividend claim must be considered the final result

*) The question, whether dividend accumulation claims are not to be rated up in accordance with the revaluation law but in accordance with general legal precriptions, must get decided by the regular courts. Should the regular courts finally decide that accumulation dividend claims are to be rated up in accordance with general legal prescriptions, then the revaluation portion as determined by the present distribution plan has to be considered an advance payment. [393]

of the dividend accumulation, reduced in accordance with the percentage (Hundertsatz) which, in comparison with the insurance sum, is due to the goldmark reserve (sect. 1) of an Endowment insurance with dividend accumulation period of even duration.

III. Amount of Revaluation.

The Revaluation quota is 15% of the amount figured out in accordance with II, 1—3. It gets paid in cash plus 5% single interests since 1. January 1930.

IV. Payment of the Revaluation Portions.

Notice to Revaluation Creditors.

1. The individual revaluation portions get paid successively as follows:
   1. Due rents.
   2. Other claims, as far as they have become due before 14th February, 1924.
   3. Death losses since February, 1924.
   4. All other claims in the succession as they have fallen due.
2. Notice of the revaluation result will be sent to the last known address of the insured or beneficiary. The filing of notice by the claimants for their revaluation claims is not necessary. The revaluation procedure will get hurried as much as possible. Enquiries can only get answered if sufficient postage has been added for the reply. But such enquiries will only delay

matters and it is therefore better to desist therefrom.

Berlin SW 68, 29. March, 1930. The Trustee.

EXPLANATION FOR THE DISTRIBUTION PLAN.

Re the "New York" insurances.

I. Technical Basis for the Calculation of the Premium Reserve.

1) For death–loss–and Endowment policies, as also for annuity insurance connected with death loss insurance.

The American experience table of mortality;

2) For plain Annuity insurance.

Emory McClintock's Table of mortality among annuitants; [394]

3) for all insurances 3% as calculation rate of interest.

The expenses for closing the business (Abschlusskesten) are not taken into account when figuring the reserve. (Nette method.)

II. Principles for calculating the gold mark reserve.

1) In place of the gold mark reserve to be calculated for the 14th February 1924 the regular (rechnungsmässige) premium reserve to be calculated for the beginning of the new insurance year in the year 1919 is to be taken as basis for the revaluation. If this premium reserve is f.i.M. 1000.— then also the revaluation basis is gold mark 1000.

2) The only exception to the rule sub. 1 is, that the full gold value of the insured death loss payment is taken as basis for the revaluation if the insured died before 14th February 1924. Regarding an insurance with fixed payment day (term fix insurance) the insurance amount discounted with calculation–interest–rate per end of the insurance year in which death occurred is taken as gold value of the insured death loss payment.

3) The premium reserve of "infirmity additions" (Invaliditats–Zusatsversicherungen) does not get considered for the calculation of the gold mark reserve.

4) Furthermore will not get considered the cash dividends which fall due after the anniversary date 1919, or the anniversary additions resulting after the anniversary day in 1919 from cash dividends as single premiums.

III. Miscellaneous.

1) The premium advance payments and loans get valued in accordance with the annex to the Revaluation Law.

2) If an insurance got changed after the anniversary date in 1919 and if for this reason the insured made additional payments, or amounts have been credited by the company, which have not been applied to premium payments, then such additional payments or credited amounts will be treated like premium advance payments.

3) Payments made by the company after the anniversary in 1919 are to be treated like loans. [395]

EXHIBIT "C."

Translation of Newspaper Clipping from the "FRANKFURTER NACHRICHTEN" of April 1st, 1930.

TO THE REVALUATION OF LIFE INSURANCES.

Now that the "Reich's Supervision Office for Private Insurance" has approved the distribution plans of most of the enterprises in connection with the life—and annuity insurances to be revaluated, and wherever this has not yet been the case, the conclusion of the tasks, conducted by officially appointed trustees for the determination of the revaluation quota to be distributed, is imminent, the following picture is obtained with regard to the amount of the revaluation percentage of the individual companies which command larger stocks:

	Percentage
A. G. für Lebens u. Rentenversicherung	12, 5
Allba–Nordstern Lebensversicherungs—A. G.	12, 5
Allgemeine Rentenanstalt	15
Allianz Lebensversicherungsbank	17, 5
Alte Stuttgarter Lebensversich. Ges. a. G.	18, 5
Der Anker, Allg. Versicherungs—A. G.	11
Arminia	10
Assicurazioni Generali	10
Atlas Deutsche Lebensvers. Gesellschaft	16
Basler Lebensversicherungs Gesellschaft	25

New Yorker Lebensversicherungs Ges.....15
(New York Life Insurance Company)
Niederländische Lebensvers. Gesellschaft.... 8
Nürnberger Lebensversicherungsbank.....16
PreuBischer Beamtenverein.....22, 6
Providentia (Frankfurt).....17, 5
Rentenanstalt und Lebensversicherungsbank.12
Rothenburger Lebensversicherungs A. G..... 9, 5
Sächaische Lebensversicherungsanstalt.....12
Schweizerische Lebensvers u. Rentenanstalt..34
[397]
Spandauer Lebensversicherungs A. G.....12, 4
Sterb-kasse des Deutschen Kriegerbundes....22, 5
Stuttgart-Lübec Lebensversicherungs A. G...17, 5
Ver. Berlinische u. PreuB. Lebensvers A. G.
.....16
Victoria au Berlin .....ea...12, 5
Volksfürsorge, Gew. Genossensch, Vers. A. G.
.....11, 4
Wiener Allianz Lebens u. Rentenvers. A. G. .. 9
Wiener Lebens u. Renten Versich. Anstalt.... 9, 25
Wilhelma Allg. Versich A. G. Nagdeburg....13, 75
Württembergischer Versicherungsverein.....15

Apart from the two exceptions mentioned, the quotas are calculated as of February 14th, 1924, and refer to the Goldmark coverage capital (Goldmark reserve) which is on hand on that date for the individual insurance. The difference in the revaluation rates is chiefly due to the fact that the revaluated assets to be distributed among the old insured, do not have a uniform composition by the individual companies. Pursuant to the Insurance Supervision Law, the enterprises admitted to do busi-

ness in Germany, among them also the branch establishments of foreign insurers (companies), were obligated to invest the reserves formed with the premium proceeds—which were destined for the security of the obligations assumed—in mortgages, State and Municipal Loans etc. The revaluation rate for mortgages, as is known, usually amounts to 25%, whereas for loans only a rate of 12,5%, 2,5% respectively, applies, as far as a revaluation comes into consideration at all. The revaluation rate of 34%, which the "Schweizerische Lebensversicherungs und Rentenanstalt (Swiss Life Insurance and Annuity Institute) is distributing, was made possible by a very important contribution out of its free capital.

(Communicated by the Protective Association of Life & Fire Insured e. V., Munich 13, Neureutherstrasse 13.)

(WH/4/21/1930.)

Filed June 7, 1930. [398]

AND AFTERWARDS, to wit, on the 30th day of September, 1930, there was duly filed in said court a supplemental affidavit of Dr. Arthur Burchard, in words and figures as follows, to wit: [399]

[Title of Court and Cause—No. L.–10,465.)

SUPPLEMENTAL AFFIDAVIT OF DR. ARTHUR BURCHARD.

State of New York,
County of New York,—ss.

Dr. Arthur Burchard, being duly sworn, says:

In my affidavit of May 9th, 1930, in this action, I stated on page 39, that by reason of the decisions therein referred to, the German courts would dismiss any action brought in "the courts of Germany against the New York Life Insurance Company to recover any claims based upon the principal amount or any dividends other than possibly unconverted accumulation dividends under any policy issued by the New York Life Insurance Company in Germany and payable in German marks and will relegate the claimant to his rights under the Revaluation Law and Enforcement Ordinance and refer him to the special procedure regulated in the said Ordinance."

On page 41 of said affidavit I stated: "There remains open in Germany only the question as to whether an action for accumulation dividends (apart and distinct from an action to recover the principal or main insurance of an accumulation dividend policy) is subject to the Revaluation Law. That question has not been finally decided by the German courts but is now pending before the Supreme Court of [400] Germany."

Up to the time of making said previous affidavit some of the German inferior courts had drawn a distinction between the principal amounts and the accumulation dividends, holding that any claim to the principal amount of the policy was governed by the Revaluation Laws while the claim to accumulation dividends was not so governed, and might be prosecuted in the regular courts, which would have to decide whether a revaluation was permissible on some legal basis outside of the Revaluation Laws. But since the language of the Revaluation Laws explicitly provides that as to all claims which are affected by their provisions, no other kind of revaluation may occur, these courts had to determine that in the given cases, the Revaluation Laws were not applicable. The reasoning of these decisions, then, started from the terms of the Revaluation Laws which specify the following requirements for an insurance claim to come within the Revaluation Laws: (1) that the claim be an insurance claim arising from a legal relation established prior to February 14th, 1924, (2) that it have as its object the payment of a definite sum of money expressed in marks, (3) that it was affected by the decline of the currency. These German inferior courts took the view that the claim to accumulated dividends was not in the nature of an insurance claim, but of an entirely different legal category ("tontine"); forthermore, inasmuch as the dividends for any particular year could not be definitely forecast in amount, they held that the claim to accumulation dividends was not for a definite sum of money, and

for these two reasons these courts held that the claim to accumulation dividends did not fall within the Revaluation Laws. This view left such a claim open to prosecution in the regular [401] courts. Other inferior German courts had held that both the claims to the principal insurance and to accumulation dividends were governed by the Revaluation Laws. In view of this confusion of the authorities I stated, in my previous affidavit, that the decisions of the German courts had left the matter of accumulation dividends still an open question.

The question has, however, been definitely and finally settled by the Supreme Court of Germany in its judgment of May 27th, 1930, in the case of Moritz Gross vs. New York Life Insurance Company, a true English translation of which decision is hereto annexed as Exhibit "A." In this case plaintiff prosecuted his claim to accumulation dividends in the court contending that the claim was not governed by the Revaluation Laws. The court of original jurisdiction dismissed the claim. The Court of Appeals held with the plaintiff and rendered judgment against defendant. The Supreme Court, however, reversed the Court of Appeals and dismissed the complaint holding once and for all that any claim to accumulation dividends, as well as any claim to the principal issurance amount, was governed by the Revaluation Laws and was to be administered by the Revaluation Trustee.

The court brushed aside such distinction as had been made between a claim to the insurance amount that is to the face or principal sum of the policy

and a claim to accumulated dividends, declaring in so many words that both claims are identical in nature and "insurance claims" within the meaning of the Revaluation Laws. The Court says, in that respect:

> "Considering, now, the claim involved in this action from the particular point of view as apparent in § 59 of the Revaluation Act, it must be held that there is involved herein a claim of the insured arising from a life insurance contract. When construing § 59, attention must be paid, from the start, to the point that the law, there, intended to extend the scope of life [402] insurance as far as it possibly could be done; this manifestly appears from the second sentence of par. 1. There cannot be any doubt that the contract of the parties of June 24, 1904 must be held to be a life insurance contract, and as to all the effects arising therefrom. The insurance entered into is referred to in the document as a "mixed" one, and it is such a one in so far as it was payable at death, if plaintiff died within the period of 20 years stated therein, and otherwise for the event of his being alive upon the expiration of the said period. Those two types of insurance which in the so-called endowment insurance policy usually are combined, shall be regarded, according to the express provisions contained in § 59 par. 1 sentence 2, as life insurance. The contract made by the parties, patently, had been intended to be, and been entered into, as a

unity contract, out of which could arise to plaintiff only a claim for payment of the nature of a unity. To dissect the contract, as to the performance due from defendant, in two parts independent from each other, is impossible already for the reason that the counter-performance of plaintiff has been determined as an absolute unity and cannot be cut up in any manner. Besides, the payments stipulated to be made by defendant are referred to in the policy expressly as "the total cash surrender value" of the policy, which clearly shows that their performance also was to be regarded as a unit. This total performance is composed, in conformity with the contract, of several items, viz. of the insurance amount as the principal item, and of secondary items which are differently fixed in case of payment at death or of payment when the insured is alive, and which have the nature of additions to the insurance amount.

"Which are the particular legal bases of those individual additions, and what method of their computation is provided for, these are circumstances which are without any bearing upon the question as to whether the contract, in its totality, is a life insurance contract. The single and uniform condition for all payments to be made by defendant was that plaintiff insured his life with it and paid the premiums stipulated therefor, and the insurance became due as to all payments on January 1, 1924, or at the time of the prior death of plaintiff; these are the points of view which, alone, are decisive

for determining the legal nature of the contract in its totality."

The court disposing of the contention that the claim to accumulation dividends was not definite in amount said: "The claim of plaintiff to payments arising therefrom was aimed at a definite sum of marks, and that not only in respect of the insurance amounts expressly determined as of [403] M 50,000 in the currency of the German Empire, but also in respect of the additional performances of defendant, in particular of the payment of his share in the accumulated dividends. * * * The claim to a share in the dividends, too, is to be computed on the basis of occurrences which belong entirely to the past, and which claim must be considered, therefore, to be a 'definite' one, though the parties herein might argue about the method of computation to be applied, and, consequently, about the amount of payment involved. At worst, the claim must be considered as 'capable of being determined' under the terms and conditions of the contract, which is sufficient according to the judicial doctrine enunciated by the Supreme Court."

The court then concludes by saying that plaintiff's claim falls within the Revaluation Law and can only be prosecuted against the trustee and not against the Insurance Company at all.

This decision of the Supreme Court of Germany together with the other decisions of the Supreme Court referred to in my previous affidavit finally determines the rights of defendant's German in-

sured and of the plaintiff in this action, under German law and under the policies written by defendant in Germany. Any claim of defendant's German insured under such policies, whether it be for the principal insurance amount of for dividends, is subject to the revaluation process and according to German law cannot be prosecuted in any court, nor otherwise than in that specially regulated administrative procedure which centers around the specially appointed trustee.

DR. ARTHUR BURCHARD.

Sworn to before me this 31st day of July, 1930.

[Seal] JOHN H. TIERNEY,

Notary Public Kings County, New York. [404]

EXHIBIT "A."

In the Name of the Empire.

VII 521.29.

Pronounced: May 27, 1930.

(Sign) Merck, with the title of Regierungsinspektor as Clerk of the Office of the Court.

In the Matter of the Mutual Insurance Company New York Life Insurance Company, represented by its president in New York, Principal establishment in Germany in Frankfort-on-Main, represented by its Chief-Representative for the German Empire,

Defendant, Petitioner in review, Respondent in joint review proceedings.

Attorney of record: Attorney-at-law Dr. Benkard in Leipsic,

versus.

Major ret. Moritz Gross in Dresden,
Claimant, Respondent, Petitioner in review by joining.
Attorney of record: Attorney-at-law Dr. Drost in Leipsic.

The Supreme Court, VII Senate for Civil Cases, composed of: Presiding Justice Mentzel, Justices of the Supreme Court Stoelzel, Dr. Freiesleben, Baron of Richthofen, Dr. Schwalb, upon the oral hearing had on May 27, 1930, has pronounced the following judgment:

I. The appeal of plaintiff by way of joining the appeal of defendant taken from the judgment of the 24, Senate for Civil Cases of the Court of Appeals of Berlin (Kammergericht) of July 10, 1929, is dismissed.

II. Upon the appeal of defendant the said judgment is reversed to the extent as it has been rendered in disfavor of the defendant, and as any decision has been made therein as to the costs of the litigation, and the appeal of plaintiff taken from the judgment of the 3d Part for Civil Cases of the Landgericht (District Court) of Berlin of March 7, 1927, is dismissed to its full extent.

III. The costs of the proceedings in this court and in the court of Appeals are also to be borne by plaintiff.

Statement of the Facts of the Case.

Plaintiff, who was born of July 13, 1855 and was formerly an Austrian and is now a Czecho-Slovak

national, had entered with defendant, [405] upon a policy, No. 1549 326 made out on June 24, 1904, into a contract the terms and conditions of which were preceded in the said document by the following captions: "Mixed insurance for 20 years. Refund of the half amount of the premiums within 20 years. Dividends-accumulation-period of 20 years." Therefore the policy, in particular, provided that, in case plaintiff should die prior to January 1, 1924, defendant was to pay the insurance amount stated at "fifty thousand mark of currency of the German Empire," and in addition a further amount, "which should be equal to the half amount of the premiums paid, computed upon the schedule of the premiums to be paid annually." If the insured was still alive on January 1, 1924, then the amount of the insurance was to be paid to him or to his lawful successors respectively. The policy furthermore, reads as follows:

> "This policy has been executed:
>
> First: Upon the basis of the application filed in writing with the Company.
>
> Secondly: In conformity with the terms and conditions set forth on the second and third page of this policy, of which the insured states to have complete knowledge, and which he recognizes as constituting an essential part of the present contract, in the same manner as though they were explicitly recited over the signatures affixed thereto.
>
> Thirdly: In consideration of the fact that the first annual premium in the amount of 3477

marks of currency of the German Empire has been paid to the Company and that a similar payment is to be made in advance on January 1 of each year during the life of this policy, until twenty full yearly premiums have been paid."

On the second page of the policy are printed the "Special terms and conditions," on the third page the "general terms and conditions." At the head of the former, there is said under the caption: "Methods of computation at the end of the dividend-accumulation-period," as follows:

"The present policy has been made out to include accumulation of dividends within a period of twenty years, expiring on January 1, 1924. If the insured is living at noon of the said day, and all premiums which became due, have been paid in full, then the Company will assign to the insured and/or his lawful successors respectively the dividends, and the policy shall be paid simultaneously in its whole amount in accordance with the computation made with one of the following three optional methods of computation: 1) in cash; or 2) in the form of an annuity for life; or 3) in the form of paid up insurance, non-participating [406] in dividends and not payable until death. * * *

The company warrants that the total cash surrender value of this policy at the end of the dividend accumulation period shall not be less than 50,000 marks in currency of the German Empire. The total cash surrender value includes, besides this guaranteed minimum

amount, also the sum of dividends assigned by the company at the said time to the policy.

If this policy is in force at the end of the dividend accumulation period, then the Company will advise the insured and/or his lawful successors respectively of the results obtained according to each one of the methods of computation referred to above.

Prior to the termination of the dividend accumulation period, no dividends shall be assigned or accorded to this policy, and the Company shall be under no obligation to give any information as to the result of the accumulation of dividends."

In the next paragraph of the "special terms and conditions" there is said, under the heading: "Cash loans against security and pledge of the present policy," as follows:

"If the premiums have been paid for three full years, the Company will accord, as loans, advance payments upon the value of the present policy."

There are then set forth detailed provisions as to the according of loans.

On the first page of the policy, on the margin, there is printed, furthermore, the following clause: "The New York Life Insurance Company is a pure mutual society with limited liability; the members insured cannot be called upon to make any payments in addition to those referred to in the policy; the reserve fund of the Company as well as all its

surplus are exclusively property of the insured persons."

On the fourth page of the policy there is printed an abstract from the application for insurance made to defendant by plaintiff on June 22, 1904, of which the following sentence is here of interest:

> "I am satisfied that the determination of the dividends which will accrue to the policy arising from the present application, shall be made in accordance with the principles and methods employed by the Company for the purpose of the distribution concerned, and [407]
>
> "I, in advance, agree to such determination of my share in the dividends, on behalf of myself as well as of any other person, who, under the proposed contract, might have or claim as interest therein."

Plaintiff has paid all the premiums due to defendant in currency of the German Empire. In 1911 he received from defendant a loan of M14,000 upon the insurance, and in 1914 a further loan of M7750; in January 1922 he repaid both sums at their face value. When he asserted his claims arising from the insurance contract, upon the expiration of January 1, 1924, defendant referred him in every respect to the revaluation law. In November 1925 he instituted suit demanding:

1. To give judgment against defendant to pay to him RM4,100 with 6% interest from January 1, 1924;
2. To give judgment against defendant to the effect to inform him as to what claim to dividends

was due to him upon the expiration of the dividends accumulation period relative to policy No. 1549 326.

In the proceedings in the lowest court plaintiff alleged that he demanded the RM4,100 in the first place as a fractional amount of the insurance amount due him, in the second place as a fractional amount of the share due him in the accumulated dividends accruing to his group.

Defendant demanded dismissal of the action, referring, in the first place, in justification thereof, to the provisions contained in the legislation relating to revaluation. In the second place, if necessary, it set off as a counterclaim against the claim of plaintiff to payments, its claim for revaluation of the loans repaid in 1922 in deteriorated currency, exceeding the amount of the claim involved in the action. Defendant gave the information demanded in such a manner as to state that the claim of plaintiff to dividends amounted to M21,535.50, calculated on the basis of its established customary per mille ratio.

The Landgericht (District Court) dismissed the complaint and that the claim to payments because of the objection raised on the ground of the set-off and the claim to receive information for the reason that the information demanded has been given.

In the proceedings in the Appellate Court plaintiff raised his claim to RM6,100 with 6% interest from January 1, 1924; he put the demand for information in the form of an [408] auxiliary demand and extending it by particular questions

raised therein. He now stated that he asserted his claim to payments merely as to be a fractional amount of his claim to a share in the accumulated dividends accruing to his group.

The parties, in the proceedings in the Appellate Court, have been agreed that defendant with respect to its German insurance policies, part of which constitutes the policy concerned herein, is an enterprise subject to the supervision of the Empire within the meaning of Art. 115 of the Ordinance of November 29, 1925 containing regulations for carrying out the Revaluation Act (Enforcement Ordinance).

The Appellate Court (Kammergericht) has rendered judgment against the defendant to the effect to pay to plaintiff RM6,100 with 6% interest upon RM4100 from the date of the service of the complaint, and upon RM2000 from June 26, 1928, the date of the last hearing before the Appellate Court when the demand thus raised was formally made; the Kammergericht has dismissed the excess demand of plaintiff to interest.

Defendant has taken a further appeal to this court. Its present demand is to the effect that the judgment appealed from should be reversed to the extent as it has been rendered to the disadvantage of defendant, and, to dismiss the first appeal taken by plaintiff. Plaintiff has joined the further appeal taken by defendant and has demanded to reverse the judgment to the extent as his claim to interest has been dismissed thereby, and to give judgment for him to the full extent of his demands

in their raised amount. Both parties, furthermore, demand the dismissal of the remedy taken by the respective opposing party.

GROUNDS FOR THE DECISION.

The judgment appealed against cannot be affirmed.

In conformity with the statement made by plaintiff in the Appellate proceedings, there is left for discussion only his claim for settlement of his share in the accumulated dividends, and detailed provisions in regard to which share are contained in Par. 1 of the "Special terms and Conditions" of the policy of June 24, 1904. The main objection of defendant thereto is to the effect that plaintiff, in regard of this claim, could not prosecute it against defendant according to the provisions of the legislation concerning revaluation. If this objection is valid, all other points of contention between the parties are settled thereby. The said objection is justified. [409] There are concerned herein § 1 and § 59 of the Revaluation Act and the Articles 95 et seq., and Art. 115 of the Ordinance of November 29, 1925 concerning regulations to the Revaluation Act. As to the last mentioned provision, to take this first, it has been established upon the agreement of the parties that defendant is to be considered, within the meaning of the said provision, as a foreign enterprise, subject to the supervision of the Empire, and that, consequently, there is no doubt that, insofar, the provisions contained in Art. 95–114 of the Regulations Ordinance apply.

Pursuant to § 1 Revaluation Act, the revaluation under the provisions of the said law takes place only where the claims involved are arising from legal relations established prior to February 14, 1924, have, furthermore, as object payment of a definite sum of money expressed in marks, and are affected by the decline of the currency. These said premises are present in this case. The contractual relationship between the parties was established in 1904. The claim of plaintiff to payments arising therefrom was aimed at a definite sum of marks, and that not only in respect of the insurance amount expressly determined as of M50,000 in currency of the German Empire, but also in respect of the additional performances of defendant, in particular of the payment of his share in the accumulated dividends. As to the currency, since all the counterperformances, according to the explicit terms, were to consist of the payment of 20 yearly premiums, each of M3477 of currency of the German Empire, there can be no doubt that also all the performances due from defendant were to be effected in currency of the German Empire to which, solely, reference is made in the contract. It would mean to arbitrarily construe the terms and conditions of the insurance, which must be considered to be "typical" within the meaning of the judicial doctrine inaugurated by the Supreme Court in its judgment, Reports of the Decisions in Civil Cases Vol. 81, p. 117, and which, therefore, are subject to the discretionary construction of the Court, if one were to hold that, under those terms, the share in the accumulated dividends should be paid

to the insured persons in a currency other than the insurance amount itself. Furthermore, as to the requirements of the presence of a definite sum of money, this requirement must be considered to have been complied with in the present case, because the performances on the part of the defendant have been due since January 1, 1924. The claim to a share in the dividends, too, is to be computed on the basis of occurrences which belong entirely to the past, and which claim must be considered, therefore, to be a "definite" one, [410] though the parties herein might argue about the method of computation to be applied, and, consequently, about the amount of payment involved. At worst, the claim must be considered as "capable of being determined" under the terms and conditions of the contract, which is sufficient according to the judicial doctrine enunciated by the Supreme Court (see the judgments of the present Senate of March 1, 1927. (VII) VI 486/26, in Zeiler, Cases of Revaluation No. 761, and of February 8, 1929, VII 360/28, ibidem No. 1601, also in the Reports of Decisions of the Supreme Court in Civil Cases vol. 113, p. 98 et seq.) As to claims arising from insurance, there must be considered, in this respect, in particular that § 59 par. 1 sentence 1 of the Revaluation Act subjects also the claims of insured persons arising from sickness, accident and liability insurance contracts to revaluation. Since the amount of the said claims is always uncertain from the beginning, but can always be ascertained, in accordance with the terms and conditions of the insurance upon the occurrence of the event involved in the in-

surance, the intention of the Revaluation Act, which, by the provisions contained in § 59, certainly did not intend to deviate from the basical provisions as contained in § 1, obviously was that it was sufficient as to the admissibility of the revaluation of a claim that its amount was capable of determination when due.

The claim of plaintiff, eventually, has also been affected by the deterioration of the currency, for the payments of premiums made by him since January 1, 1918, were not of full value within the meaning of the Revaluation Act (§ 2), and the said circumstances necessarily was bound to have a bearing upon the determination of the amount of the share in the accumulated dividends accruing to him. But even apart from this consideration, the claim must be held to have been affected by the deterioration of the currency for the reason that it has arisen, under the terms of the contract, in the currency of the German Empire as it prevailed in 1904, and which later on deteriorated. The respondent, to be true, objects thereto, holding that a claim of continued full value to his share in the dividends to be earned by defendant during the life of the contract has been accorded to him. But this cannot be affirmed. The note on the margin of the policy that the safety fund and all surplus earned by the Company should be the exclusive property of the insured is not apt in itself, to establish such a claim thus valued. In no event a transfer of title has been accomplished thereby, nor can it be shown therewith that [411] from the aggregate property of defendant certain definite objects

of property have been separated for the specific purpose to serve for the separate satisfaction of a group of insured on account of their claims to a share in dividends. Also the additional allegations of respondent in this respect do not show the formation of such a separate property fund which would be the necessary basis of the claim to full value as asserted by him. According to his own statement of the facts involved, merely entries into the books of defendant as to the ascertained shares in the dividends accruing to the insured have occurred, but no separation of particular objects of property. Those entries into the books, however, could not bring about any change in the legal situation actually prevailing that to the insured persons claims of the mere nature of an obligation to such payments of money were accorded as would be due to them, under the terms of the insurance, upon the occurrence of the event involved in the insurance.

Considering, now, the claim involved in this action from the particular point of view as apparent in § 59 of the Revaluation Act, it must be held that there is involved herein a claim of the insured arising from a life insurance contract. When construing § 59, attention must be paid, from the start, to the point that the law, there, intended to extend the scope of life insurance as far as it possibly could be done; this manifestly appears from the second sentence of par. 1. There cannot be any doubt that the contract of the parties of June 24, 1904, must be held to be a life insurance contract, and as to all the effects arising therefrom. The insurance entered into is referred to in the document as a

"mixed" one, and it is such a one in so far as it was payable at death, if plaintiff died within the period of 20 years stated therein, and otherwise for the event of his being alive upon the expiration of the said period. Those two types of insurance which in the so-called endowment insurance policy usually are combined, shall be regarded, according to the express provisions contained in § 59 par. 1 sentence 2, as life insurance. The contract made by the parties, patently, has been intended to be, and been entered into, as a unity contract, out of which could arise to plaintiff only a claim for payment of the nature of a unity. To dissect the contract, as to the performances due from defendant, in two parts independent from each other, is impossible already for the reason that the counter-performance of plaintiff has been determined as an absolute unity and cannot be cut up in any manner. Besides, the payments stipulated to be made by defendant [412] are referred to in the policy expressly as "the total cash surrender value" of the policy, which clearly shows that their performance also was to be regarded as a unit. This total performance is composed, in conformity with the contract, of several items, viz.: of the insurance amount as the principal item, and of secondary items which are differently fixed in case of payment at death or of payment when the insured is alive, and which have the nature of additions to the insurance amount.

Which are the particular legal bases of those individual additions, and what method of their computation is provided for, these are circumstances which are without any bearing upon the question

as to whether the contract, in its totality, is a life insurance contract. The single and uniform condition for all payments to be made by defendant was that plaintiff insured his life with it and paid the premiums stipulated therefor, and the insurance became due as to all payments on January 1, 1924, or at the time of the prior death of plaintiff; these are the points of view which, alone, are decisive for determining the legal nature of the contract in its totality.

From what has been said *supra* it appears that the view of the Kammergericht as to the nature of the present contract cannot be approved. It imports that the claims of plaintiff consist of two elements basically different from each other, the one of which is, in itself, outside of the realm of the conception of a "life insurance contract." The claim for a settlement of a share in a twenty years' accumulation of dividends is there construed by the Appellate Court as arising from a so-called "Tontine," and the assumption is that herein a true contract of game is involved the nature of which is entirely alien to the nature of a life insurance contract, and, therefore, has nothing to do with life insurance as such. Against this view the objection of the defendant in its brief would be justified that, then, such part claim concerned therein of plaintiff should have been held not to be actionable in accordance with § 762 Civil Code, which would have been a matter of judicial notice (see Commentary of the Judges of the Supreme Court to the Civil Code, note 2 to § 762). But it is true that the view of the defendant presented in the present proceed-

ings should be approved that a contract of "Tontine" cannot be considered as being a contract involving game. An accident is always, in every case of insurance, operative in the direction that [413] its economic result is favorable either to the insurer or to the insured and particularly in the case of a life insurance and the time of the death of the insured which, in this respect, must be regarded as an accident, is decisive therefor. In the case of a contract of "Tontine," as a consequence of the participation therein of a multitude of insured persons, the accident may play a still larger part, but, nevertheless, its legal nature remains that of an insurance contract unless, under the particular agreement of the parties in a given case, the elements of a contract of annuities should be placed in the foreground. In the present case, however, this point of view may be disregarded, as defendant has not promised any annuity. The legal view of the kammergericht apparently rests upon the article "Tontine" in the Insurance Encyclopaedia, edited by Manes, in its 2. edition of 1924 (column 1220/1221), which article starts with the sentence: "Tontine is a game in which the profit depends upon the duration of the human life." This doubtful sentence which would similarly be valid for every life insurance, is, however, not included any more in the 3. edition of the said Insurance Encyclopaedia, published in 1930; there, in the article "Tontine" dealt with on column 1571 to 1573, which has been revised also in other respects, the term of "game" is entirely omitted. But it is entirely unnecessary in the present case to determine upon the question as

to whether the elements of a contract of "tontine" are here present, or upon the legal nature of such a contract. For, in any event, nothing else is involved here but an incidental agreement made within the scope of the single life insurance contract by the parties thereof.

If, considering all this, § 59 Rev. Act is applicable, then the immediate consequence is also the applicability of Arts. 95 et seq. Reg. Ordinance of November 29, 1925. In the second sentence of Art. 95 the condition for its application referred to in § 1 Rev. Act which have been already discussed *supra,* are merely repeated. As has been established by the Appellate Court, the parties are agreed that a premium reserve fund within the meaning of § 56 et seq. of the Insurance Supervision Law had to be formed (see Art. 95 sentence 1). In effecting, consequently, the revaluation in conformity with the provisions contained in Art. 96 et seq. Reg. Ord., the Trustee (Treuhaender) provided therein is the one about whom the procedure centers. Against him only the insured persons may prosecute their respective claims to revaluation, not against the insurer himself (see Dec. of the Supreme Court in the Reports of the Decisions in Civil Cases, vol. 121, p. 1, 2 et seq; of July 12, 1928, V51/28 [414] repr. in Zeiler, Aufwertungsfaelle (Revaluation Cases) No. 1358). That the Trustee appointed for defendant has approved the action instituted by plaintiff against defendant, has not been alleged by plaintiff.

Considering this result of the present discussion, it is not necessary to discuss any additional points

of contention. In particular the question, which has been discussed, upon an extended taking of evidence by the lower court, as to how far plaintiff is bound to any consent of his declared in advance to the manner in which the defendant would compute his share in the accumulated dividends, and as to whether the employment of any method of computation other than that applied by defendant would conform to the requirements of good faith, belongs to the scope of operations of the Trustee, and also in so far plaintiff would have to prosecute his claim against the latter.

The further appeal taken by defendant, therefore is justified. The judgment of the Appellate Court is reversed to the extent as it has been rendered in its disfavor, and the first appeal of plaintiff taken from the judgment of the Landgericht (District Court) by which the complaint has been dismissed, is dismissed to its full extent. There was no reason to remand the matter to the Appellate Court.

The dismissal of the further appeal taken by plaintiff by way of joining the appeal the opposing appeal necessarily follows therefrom,

(Sign.) Mentzel. Stoelz. Dr. Freiersleben. Baron of Richthofen. Schwalb.

Certified.

L. S. Signature, with the title of Regierungsinspektor as Clerk of the Office of the Court.

Amount involved in the litigation in the proceedings before the Supreme Court: R.M. 6,100.

Filed September 30, 1930. [415]

AND AFTERWARDS, to wit, on the 30th day of September, 1930, there was duly filed in said court a supplementary affidavit of A. E. Clark in words and figures as follows, to wit: [416]

[Title of Court and Cause—No. L.–10,465.]

SUPPLEMENTAL AFFIDAVIT OF A. E. CLARK.

State of Oregon,
County of Multnomah,—ss.

I, A. E. Clark, being first duly sworn, upon oath depose and say:

I am one of the attorneys of record for the defendant in the above-entitled action, and in all other actions now pending in this court and the Circuit Court of the State of Oregon for Multnomah County, brought against the defendant upon German Mark Insurance contracts; and I am also attorney of record in all actions now pending in this court and in the Circuit Court of the State of Oregon for Multnomah County against the Guardian Life Insurance Company upon German Mark Insurance contracts. In an affidavit heretofore made and filed by me in this case, the cases against the above-named defendant and against the Guardian Life Insurance Company upon German Mark

Insurance contracts brought and now pending in this court and in the said State Court are enumerated. These cases involve [417] about 251 policies. The cases are 28 in number, and one Paul Herrmann of Heidelberg, Germany, appears as plaintiff in ten of these cases, involving 227 policies, issued to divers residents and citizens of Germany, and which Herrmann claims have been assigned to him. Herrmann does not appear and does not sue as a policy-holder in any of these actions.

Herrmann has for several years been very active in Germany among the holders of German Mark insurance contracts in promoting and encouraging litigation against the defendant and other American insurance companies, which issued insurance policies in Germany prior to the World War. I am informed, believe, and therefore the fact to be that Herrmann has no interest in any of said policies or litigations, except such interest as he may have contracted with the several policy-holders to receive out of the proceeds of the litigations which he is promoting. Attached to my former affidavit as Exhibit "A" is a copy of a document in which this interest is defined. I am informed, believe and aver the fact to be that said exhibit "A" is the form of instrument under which the said Herrmann claims to act in the bringing and prosecuting of this litigation, and is also the form of instrument under which all of said actions have been brought.

Attached hereto and marked exhibit "I" is a

copy of a circular letter. I am informed, believe and therefore allege that this circular letter was prepared, signed and sent out from Heidelberg, Germany by Paul Herrmann, plaintiff, in the various actions referred to, to the German citizens and subjects to whom the policies were issued that are [418] involved in the various actions referred to, and to other holders of German Mark insurance contracts, among whom litigation in American courts is being promoted and encouraged by said Herrmann. The Dr. Kuehn referred to in the said Herrmann circular letter is a German lawyer who has been very active during the past five or six years by circulating letters, press articles and personal solicitations in securing for himself representation of German Mark insurance contracts for prosecution either in German tribunals or in the American courts.

The case of Ewald Luetjohann, plaintiff, vs. New York Life Insurance Company, a corporation, defendant, is one of the German Mark insurance contract cases pending in the state court. Substantially the same issues of law and fact involved in the case will be, among others, involved in all of the cases. In that case the plaintiff has filed a motion to inspect at the office of the affiant in the Yeon Building, Portland, Oregon, all of the day books, journals and ledgers kept by defendant during the years 1922 to 1928 inclusive, whether in book form or otherwise, and all balance sheets and trial balances, also all lists, registers and other records containing the names of all policy-holders and the amounts and kinds of insurance, issued and in effect

during said years; all other books, papers, documents and records in the possession of defendant which disclose the amount of profits made each of said years by defendant and which disclose the present whereabouts, amount, and situs of the assets and surpluses of defendant, and the investments thereof. All books of account, papers, documents and records in the possession of defendant which disclose the unit of value, i. e., American dollars or other units, in which the profits, [419] surpluses and assets of defendant were earned by defendant and were kept during said years and are now kept and figured and calculated in said books and accounts.

In the affidavit of one of the attorneys for Leutjohann, filed in support of the motion to inspect, some of the issues are summarized, which, as stated, are similar to issues in each of the German Mark insurance contract cases, and it is averred, "the evidence to sustain said issues is all in the possession of the defendant, consisting of books, papers, documents and records, and the same are necessary to prove plaintiff's cause of action; and it is necessary that plaintiff have an inspection and opportunity to take a copy of the said evidence in order to present his case." Attached hereto as Exhibit "2" is a true copy of said motion for inspection, and attached hereto and marked Exhibit "3" is a true copy of the affidavit in support thereof.

The affidavit of William MacFarlane, Third Vice-president and Actuary of the New York Life Insurance Company, has been filed in opposition to said motion to inspect. In said affidavit it is

pointed out that what counsel for plaintiff in the Leutjohann case has requested, and what, no doubt, they will request in each of the German Mark insurance contract cases, is the production at Portland, Oregon, some 3,000 miles away from the home office of the New York Life Insurance Company and some 6,000 or 7,000 miles away from where the policy-holders reside, the transactions consummated and much of the documentary evidence is located, is a vast quantity of original books, papers, correspondence, and the like, a great deal of which is in daily and constant use by the defendant in its various activities. Hereto attached [420] and marked Exhibit "4" is a true copy of the aforesaid affidavit of Mr. MacFarlane, the original of which is on file with the County Clerk of Multnomah County, Oregon.

The said motion to inspect and affidavit supporting the same, and the affidavit of Mr. MacFarlane are in this connection submitted to the court for the reason, among others, of making clear to the court the impracticability of trying this and like cases in the courts of Oregon, and the expediency or necessity of declining to retain jurisdiction and sending them back to be tried where the evidence is located and the causes of action arose.

A. E. CLARK.

Subscribed and sworn to before me this 30th day of September, 1930.

[Seal] LEONARD H. WATERMAN,
Notary Public for Oregon.

My commission expires June 4, 1934. [421]

EXHIBIT No. 1.

COPY OF CIRCULAR.

Heidelberg, July 3, 1930.

TRANSLATION
Paul Herrmann,
American Banking Firm,
Heidelberg.

TO THE AMERICAN INSURED.

By the decision rendered by the Chamber of Appeals (Berufungs-Senat) of the Reich Insurance Department for Private Insurance, the American life insurance companies were declared to be still under Reich control, and another decision rendered by the German Supreme Court (Reichs-Gericht) made the above decision of the Chamber of Appeals of the Reich Insurance Departments its own inasfar as even to dismiss an action brought to secure a higher revalorization of cumulative dividends.

By agreement between the Reich Insurance Department for Private Insurance and the New York Life set the quota of revalorization payable by the latter in conformity with the Revalorization Law at 15% of the gold value of the Premium reserves. The collossal assets of the New York Life would most assuredly have justified a much higher quota. That a higher rate was not fixed may without doubt be attributed to a conversation between the business manager of the Reich association for American Insured, attorney Dr. Kuehn and the Reich In-

surance Department for Private Insurance in November 1928 in Berlin, in the course of which Dr. Kuehn stated that the insured will be satisfied with a revalorization of 10 to 15%. When I demanded an explanation of his statement, Dr. Kuehn answered as follows:

> "In reply to your inquiry, I confirm the statement made to you once before, that the declaration made before the Reich Insurance Department for Private Insurance only referred to the German procedure. The conversation alluded to took place November 30, 1928, in the interim between the two decisions of the Chambers of Appeal, by the first of which the New York Life was recognized as a company subject to the jurisdiction of the Reich Insurance Department. I declared at that time—and rightfully in view of the state of affairs—that under the circumstances, a quota of 15% had to be secured, if possible, in the agreement, and that I believed such a quota would be accepted by the insured."
>
> "The conditions on which this mutual opinion were based were found not to exist, for the state of affairs later changed completely, so that the Chamber of Appeals of the Reich Insurance Department was altogether unjustified in bringing up this statement."

I brought the above-mentioned decisions to the attention of my American business friends and inquired what retroactive effect these decisions would exert on the law-suits instituted in the United

States. I received the following reply to same dated June 2nd, 1930: [422]

> "We fully agree with the opinion with respect to the fact that any German policy-holder who has availed himself of the revalorization stock procedure, is automatically eliminated from any action taken in the United States on his policies.
>
> It will therefore be advisable for you to issue a circular to be sent to the individual policy-holders, informing them that they should not have recourse to the revalorization procedure, and notifying them at the same time that, if they do so, they thereby forfeit their legal rights in the American Lawsuits and in the American courts."

With respect to the status of lawsuits brought in the United States, my business friends state the following:

> "The cases here are all being conducted very slowly of course, owing to the tremendous amount of work that has arisen, and to the fact that the insurance company puts up a powerful fight in every case, so that cases which could be settled in a week or two are dragged out for months and months. All the briefs from these cases have been submitted and the cases themselves are ready for examination and we are quite sure that the cases will be tried this fall and be finally settled in the lower courts."

Yours, etc.,

Sgd. PAUL HERRMANN. [423]

EXHIBIT No. 2.

In the Circuit Court of the State of Oregon, for Multnomah County.

No. 3376.

EWALD LUETJOHANN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

MOTION FOR INSPECTION AND COPY OF EVIDENCE.

Comes now the plaintiff and moves the court for an order requiring the defendant to give to plaintiff an inspection and copy of the following books, papers and records, the same now being in the possession of defendant and containing evidence material to the issues to be sustained by the plaintiff in the above-entitled action; and that such inspection be made at a convenient place in the City of Portland, Oregon, to wit: at the office of A. E. Clark, one of the attorneys for defendant, in the Yeon Building, Portland, Oregon, on a day and succeeding days to be named by the court.

All the day books, journals and ledgers kept by defendant during the years 1922 to 1928 inclusive, whether in book form or otherwise, and all balance sheets and trial balances, also all lists, registers and other records containing the names of all

policy-holders and the amounts and kinds of insurance, issued and in effect during said years; all other books, papers, documents and records in the possession of defendant which disclose the amount of profits made each of said years by defendant and which disclose the present whereabouts, amount and situs of the assets and surpluses of defendant, and the investments thereof. All books of account, papers, documents and records in the possession of defendant which disclose the unit of value, i. e. American dollars or other units, in which the profits, surpluses and assets of defendant were earned by defendant and were kept during said years and are now kept and figured and calculated in said books and accounts.

Also the contract dated December 31, 1921, between defendant and the German corporation referred to in the pleadings herein as Kronos, purporting to transfer the German business of defendant to said Kronos.

This motion is based upon the pleadings herein and upon the annexed affidavit.

Signed: C. T. HAAS,
Signed: E. B. SEABROOK,
Attorneys for Plaintiff. [424]

EXHIBIT No. 3.

In the Circuit Court of the State of Oregon for Multnomah County.

No. 3376.

EWALD LUETJOHANN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

AFFIDAVIT OF C. T. HAAS.

State of Oregon,
County of Multnomah,—ss.

I, C. T. Haas, being first duly sworn, do depose and say that I am one of plaintiff's attorneys and prepared the pleadings on the part of plaintiff and am familiar with all the pleadings in this cause.

That issues are made in said pleadings to be sustained by the plaintiff and which are material to the plaintiff's cause of action as follows:

The amount of profits and surpluses made by defendant from its entire business during the years of 1922 to 1928 inclusive:

The unit of value in which said profits have been kept and calculated by defendant, and in which said profits have been invested during said years:

The location and situs, at the time of the commencement of this action, of said assets and surpluses:

The units of value in which said profits were earned by defendant during said years:

The contents of a certain contract made on December 31, 1921, between defendant and the corporation referred to in the pleadings as Kronos.

The evidence to sustain said issues *in* all in the possession of the defendant, consisting of books, papers, documents and records, and the same are necessary to prove plaintiff's cause of action; and it is necessary that plaintiff have an inspection and opportunity to take a copy of the said evidence in order to present his case.

Plaintiff is willing and hereby consents that said inspection and opportunity to take a copy of said evidence be made at the office of defendant's attorney, A. E. Clark, in the Yeon Building, Portland, Oregon, at such time as the Court shall direct.

(Signed) C. T. HAAS.

Subscribed and sworn to before me this 19th day of August, 1930.

(Signed) PETER A. SCHWABE,
Notary Public for Oregon, Where Commission Expires 9–26–31. [425]

EXHIBIT No. 4.

In the Circuit Court of the State of Oregon for Multnomah County.

No. 3376.

EWALD LUETJOHANN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR INSPECTION AND COPY OF EVIDENCE.

State of New York,
County of New York,—ss.

William MacFarlane, being duly sworn, deposes and says:

I am Third Vice President and Actuary of the New York Life Insurance Company, the defendant herein. I am fully acquainted with the books and records of the defendant company and with its system of bookkeeping.

Plaintiff has moved the court for an order requiring the defendant to produce for plaintiff's inspection in the City of Portland, Oregon, all the books of accounts and records, whether in book form or otherwise, kept by defendant during the years 1922 to 1928, inclusive, and relating to all of its policies issued or in effect during such years.

Among the books and records demanded by plain-

tiff are "All the day books, journals and ledgers kept by defendant during the years 1922 to 1928, inclusive, in book form and otherwise, and all balance sheets and trial balances," and "all other books of account, documents, [426] papers and records in the possession of the defendant which disclose the amount of profits made each of said years by defendant and which disclose the present whereabouts, amounts and situs of the assets and surpluses of the defendant, and the investments thereof," and "all books of account, papers, documents and records in the possession of the defendant which disclose the units of value." The foregoing books and records as demanded by plaintiff comprise hundreds of volumes of current books of accounts, consisting of many kinds of cash books, journals and ledgers, kept by the numerous departments of defendant's business, and they also include hundreds of thousands of unbound sheets of accounts. These day books, journals, ledgers and accounts constitute the current books of account of the defendant in its various departments. They are in constant daily use by scores of the accountants and actuaries of the Company and they could not be removed from defendant's New York office without hopelessly disrupting all of the departments of the defendant's business and stopping the Company's operations.

The "lists, registers and other records containing the names of all policy-holders and the amounts and kinds of insurance issued and in effect during the years 1922 to 1928, inclusive," demanded by plaintiff, are kept by defendant only in card form.

There are separate cards for each kind of information concerning each policy, including index cards, brief cards, mortality cards, premium cards and dividend cards. These cards are kept in different departments and each card contains only such information [427] concerning the policy as is necessary for the purpose of the department in which it is kept. None of these cards contain all of the information about the policy, but all must be consulted together to ascertain the status of any particular policy; nor is there any record other than these cards which gives any information about the policies issued or about the policy-holders. The Company had outstanding during the period covered by plaintiff's request more than 2,500,000 policies. It would be necessary, therefore, in order to meet plaintiff's request contained in this motion, to send to Oregon many millions of policy cards, which constitute all of defendant's records concerning its individual policies issued and in effect during the years 1922 to 1928. These cards are in daily use by hundreds of defendant's employees in making loans, computing dividends, converting policies, paying claims, answering inquiries and otherwise dealing with its policies and policy-holders. The removal of these cards from the Company's New York office would absolutely stop the Company's functioning in regard to its policies and policy-holders.

Some idea of the volume of books and records requested by plaintiff may be gleaned from a recent experience of the New York Life Insurance Company in moving its headquarters from 346 Broad-

way to its present headquarters, 51 Madison Avenue. The distance between the old headquarters and the new is about one and one-half miles. It took thirty trucks, in constant operation for four days and nights to move the books and records of the Company.

The experience of the auditors of the New York State Department of Insurance is also instructive on this point. The auditors examine the accounts of the company [428] every three years. It takes 25 or 30 accountants from the State Department of Insurance a period of approximately four months to cover the books and records of the Company for a three-year period.

It is difficult to estimate the volume of the books and records requested by plaintiff but, assuredly, to transport these records to the State of Oregon would require many fully loaded railroad freight cars, and their removal from defendant's New York office would completely disrupt and stop defendant's business in all of its departments.

It is not clear from the plaintiff's motion whether his demand for inspection covers also all books of account and policy records relating to the defendant's business in Germany. If it does cover such books and records, the court's attention should be called to the fact that the defendant has in its possession only fragmentary records concerning its German business and policies. Such fragmentray books and records as it possesses concerning its German business and policies are in its New York office, but practically all of the books and records relating to said business and policies are in Germany in

the possession of the Revaluation Trustee appointed by the German Insurance Department under the provisions of German law for the liquidation of the defendant's German business, and in the possession of the "Mannheimer" Life Insurance Company in Germany, said company being the successor to the "Kronos" Life Insurance Company, which became the assignee of defendant's German business under the provisions of German law and the regulations of the German Insurance Department. The foregoing books and records are in constant use by the aforesaid Trustee and said "Mannheimer" Life Insurance Company in the settlement of said policies and the [429] liquidation of said business and defendant has no control over them and is informed and believes that the German authorities would not consent to their removal from Germany.

WILLIAM MacFARLANE.

Subscribed and sworn to before me this 12th day of September, 1930.

GEO. J. WIRTENSON, Jr.

[Notarial Seal] GEO. J. WIRTENSON, Jr., Notary Public, Rockland County. Certificate Filed New York County No. 230. New York Register No. 2W207.

My commission expires March 30th, 1932.

Filed September 30, 1930. [430]

AND AFTERWARDS, to wit, on the 3d day of November, 1930, there was duly filed in said court, an affidavit of Peter A. Schwabe, in words and figures as follows, to wit: [431]

[Title of Court and Cause—No. L.-10,465.]

AFFIDAVIT OF PETER A. SCHWABE.

I, Peter A. Schwabe, being duly sworn, do depose and say—I am familiar with both the English and German languages and read and write both of them. German is my native language.

The annexed Exhibits "A," "B," "C," "D" are true and correct translations from the German language to the English language of the whole of the documents so translated.

PETER A. SCHWABE.

Subscribed and sworn to before me this 31st day of October, 1930.

[Seal] IDA BELLE TREMAYNE,
Notary Public for Oregon.

My commission expires 7/10/32. [432]

EXHIBIT "A."

TRANSLATION.

(front page)

NEW YORK
LIFE INSURANCE COMPANY

A purely mutual Company without assessment obligations.

Results of the business year 1914.

Main headquarters for Germany:

Berlin W. 66, Wilhelmstrasse 80 a.

(Inside page)

THE "NEW YORK" WAS FOUNDED MORE THAN 69 YEARS AGO.

The New York Life in the course of the year 1914 issued more than

100,000 Policies

of a capital of more than

950 Million Marks

for which the first premium was paid into the Company in cash. There are at present in effect in the "New York" more than

1 Million 142 Thousand Policies

which represent a secured capital of more than

9,975 Million Marks

for the business year 1914 a net increase of more than

314 Million Marks.

During the year 1914 the "New York" paid for a total of more than 8,500 death cases of insureds a total insurance sum of more than

111 Million Marks.

The "New York" paid on mixed insurance which became due and for other payments due during the lifetime of the insureds approximately

194 Million Marks

The "New York" loaned to its insureds against security of their policies more than

153 Million Marks

The "New York" paid to its insureds in dividends over

72 Million Marks.

(Last page:)

The report of December 31st, 1914, to the State of New York shows as follows:

AKTIVA:

3 Billion 361 Million Marks.

PASSIVA:

---

2 Billion 855 Million Marks.

Dividend and Security Reserve:

505 Million Marks.

Total insurance outstanding over

9 Billion 975 Million Marks,

distributed over more than 1,142,000 Policies, whose holders form the Company, to whom the Company belongs, and who benefit by all profits. [433]

EXHIBIT "B."

TRANSLATION

KINDLY FOR OBSERVATION.

You have now become a member of the "New York" Life Insurance Company. Your interests are therefore now completely those of the Company, as the "New York" IS NOT A STOCK CORPORATION, but an Institution based on PURE MUTUALITY. Despite this you are once and for all protected from any obligations for assessments.

You participate in the profits of the Company in proportion to your own deposits, and these profits will from year to year, as a rule from the end of the second insurance year on the anniversary day of the insurance however not before March 31st, be communicated to you and accounted for.

(In red)

It is especially in the interest of each member of the "New York" Life Insurance Company, that they do not let themselves be influenced by the agents of other competitive insurance Companies to give up his existing policy in the "New York." Always keep before your eyes that a premature giving up of insurance is against your interests and that agents who seek to influence you thereto, do not have in mind your advantage, but wish to earn at your expense.

If you intend to increase your insurance it is your best interest to do this with the "New York" of which you are a member, as thereby you increase the business and the profits of the Company and thereby again serve your own interests.

Convince yourself that the "New York" belongs to the greatest and safest life insurance companies in the World and that through its international character it is so extensive as no other company. The "New York" is active in most of the civilized nations in the five world continents, and its risks therefore distribute themselves over a vast territory. This is of the very greatest importance for the security of a life insurance company. In addi-

tion thereto the insurance conditions of the "New York" assures a protection and a freedom of commerce in so wide-spread a manner as probably no other life insurance Company.

The "New York" is therefore entitled to expect of you to consider it first of all in taking of further insurance and that you do not permit yourself to be deceived by unethical competition through alluring representations to give up your policy.

Should someone try this or try to circulate something unfavorable against the "New York" without regard for decent competition, we urgently request you to inform us immediately thereof. We shall always be gladly ready to impart any desired explanation.

"NEW YORK" LIFE INSURANCE COMPANY,
General headquarters for Germany,
Berlin W. Wilhelmstrasse 80 A. [434]

EXHIBIT "C."

NEW YORK LIFE INSURANCE COMPANY.
"New York" Life Insurance Company
General Headquarters for Germany:
Wilhelmstrasse 80 A Berlin W. 66.

Postal Checking Account:
Berlin Office #6109

Cable Address:
NYLIC—BERLIN

Telephone:
Central #8750.

TO THE INSUREDS OF THE NEW YORK LIFE INSURANCE COMPANY.

A series of inquiries from the circle of our in-

sureds motivates the undersigned general headquarters to declare:

This headquarters will—no matter how the relations with the United States may develop—continue to carry on its German business as heretofore. It arrives at all decisions about German Insurance contracts independently and disposes over entirely adequate money resources, to meet all obligations to German insureds. Therefore all payments will, as heretofore, be paid and premiums received.

But even then—in the event of War with the United States—if the United States should issue a prohibition of payment from the United States to Germany, this would not affect the payments here on German insurance contracts, that is also then the sums due on German insurance contracts would be paid and correspondingly premiums received.

Incidentally also during the Spanish-American War the New York Life Insurance Company paid in Spain the insurance sums which became due on Spanish insurance contracts.

It is especially pointed out that for all German insurance contracts here in Germany the full premium reserve, that is the current value of each policy, is safely deposited. The liquid securities in the premium reserve which according to the quotations of the exchange of January 15th, 1917, had a current value of 78,090,815 Marks, are so deposited that they cannot be disposed of without the consent of the Imperial Supervising Office for Private Insurance.

In addition the Company has pledged to the Imperial Fiscal Agents a reserve of 2,000,000 Marks.

There does not exist for the insureds of the New York the slightest grounds for any worry.

Berlin, March, 1917.

The General Director and Chief attorney-in-fact for the German Empire.

(Sgd.) G. NIMPTSCH.

Amount on February 17, 1917—
On March 8, deposited Marks 1,025,000.
On March 8, total amount Marks 79,115,815. [435]

EXHIBIT "D."

NEW YORK LIFE INSURANCE COMPANY
"New York" Life Insurance Company
General Headquarters for Germany:
Wilhelmstrasse 80 A Berlin W. 66.

Postal Checking Account:
Berlin Office #6109

Cable Address:
NYLIC—BERLIN

Telephone:
Central #8750.

TO THE INSUREDS OF THE NEW YORK LIFE INSURANCE COMPANY, IN GERMANY.

Representatives of other Life Insurance Companies are attempting instead of obtaining new business for their Companies in an unobjectionable manner to induce insureds of the "New York" to cash in their contracts with us and instead to take new insurance with other Companies. Should the

according to our annual report to the Imperial Supervising Office they were in 1915: 390,566,649.01 Marks and in the year 1916: 413,349,653.76 Marks. Naturally the capital sum has increased correspondingly; On December 31st, 1915 it was: 10,216,163,-731 Marks, and on December 31st, 1916, 10,674, 330,-914 Marks. This illustration shows what deception is being practiced.

We sincerely hope that the above statement of facts will prevent you from prematurely giving up your insurance in the New York Life Insurance Company.

Should you nevertheless have any doubts we ask your communication.

Berlin, March, 1918.

The General Director and Chief Attorney-in-fact for the German branch.

(Sgd.) G. NIMPTSCH.

Filed November 3, 1930. [437]

AND AFTERWARDS, to wit, on the 3d day of November, 1930, there was duly filed in said court an affidavit of C. T. Haas, in words and figures as follows, to wit: [438]

[Title of Court and Cause—No. L.–10,465.]

AFFIDAVIT OF C. T. HAAS.

I, C. T. Haas, being first duly sworn, do depose and say that I am the attorney for the plaintiff in the above-entitled action: That Exhibit "A" attached to the affidavit of Peter Schwabe filed herein

is a circular published and circulated in Germany by defendant for the purpose of inducing its policy-holders to continue paying premiums on their policies; that Exhibit "B" attached to said affidavit is printed matter upon all envelopes in which defendant delivered its policies to its policy-holders in Germany; that Exhibits "C" and "D" are circular letters issued and sent by defendant to all its German policy-holders.

Upon most of the policies issued by defendant to German policy-holder*s* there is stamped by defendant before issuance of the policy the following words:

> "The security fund of the Company as well as all surpluses of it are the exclusive right of the insured."

The same is stamped upon the policies mentioned and described in the second and fourth causes of action set out in the amended complaint in the case of Hermann vs. New York Life Insurance Company, No. L.–10,535, pending in this Court.

The case referred to on page 6 of the affidavit of A. E. Clark as No. 23, being Kahn vs. New York Life Insurance Company, was begun in the Circuit Court of the State of Oregon for Multnomah County and is an action to recover damages for the failure of defendant to pay the amounts due upon a policy, similar to the ones involved herein, except that it is a 20-year endowment tontine policy. The plaintiff in that case is a citizen and subject of Germany. The lower court refused to take jurisdiction because both parties were nonresidents of Oregon and the cause of action was alleged [439] to

arise outside of Oregon. A mandamus proceeding was instituted against Judge Tazwell, who declined to take jurisdiction, to compel him to take jurisdiction, with the result that the Supreme Court of Oregon ordered and directed the Circuit Court to take jurisdiction and proceed with the trial and determination of the cause. The opinion of the Oregon Supreme Court is reported in 125 Or., page 528. In the course of the opinion, on page 536, the Court said:

> "The further question arises whether the court has jurisdiction of a cause of action and of the parties"—

(Then follows a review of authorities.)

Then on page 542, the Court said:

> "The cause of action of plaintiff against the corporation is a transitory one. The Court obtained jurisdiction of the corporation and has jurisdiction of the subject matter of the action, notwithstanding the fact that the contract of insurance was executed outside the state and notwithstanding the fact that the plaintiff is a nonresident of the State of Oregon."

And on page 545, the Court said:

> "We are constrained to hold upon the weight of authority and reason that the Circuit Court has jurisdiction of the defendant, New York Life Insurance Company, and of the subject of the action and should entertain such jurisdiction and proceed with the hearing and determination of the action mentioned."

In the State of New York there is a statute which prohibits the Courts of New York to entertain jurisdiction of a controversy of nonresidents of that State where the cause of action arose outside the State and the statute has been held to be constitutional.

Anglo etc. Co. vs. Davis etc. Co., 191 U. S. 373, 24 S. Ct. 92.

The New York Civil Code of Procedure, Section 1780, provides as follows:

"An action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation or by a non-resident in one of the following cases only:

1. Where the action is brought to recover damages for the breach of a contract made within the State or relating to property situated within the State at the time of the making thereof.
2. Where it is to recover real property situated within the state or a chattel, which is replevied within the state. [440]
3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State.

(In 1913 by an amendment Section 4 was added.)

4. Where a foreign corporation is doing business within this State."

See Gregonis vs. P. & R. etc. Co., 235 N. Y. 152.

New York decisions based on that statute are therefore not applicable here.

During all the times mentioned in the pleadings there was and is now in the State of New York a statute being Section 89, Article 2, Book 27 of McKinney's Consolidated Laws of the State of New York, a copy of which is attached to the reply in this case.

The effect of this law is to prohibit discrimination by Mutual Insurance Companies between its members and policy-holders. And this is admitted in the affidavit of Walker Buckner, Vice-president of defendant, on pages 20 and 21 thereof.

I am a duly licensed and practicing attorney at law of the State of Oregon and I am familiar with the laws of the State of New York respecting Insurance and Insurance Companies. There is no law of the State of New York which limits the recovery of a policy-holder or member of a Mutual Company to the funds of the Company located at any particular place or in any particular country, but all the assets of the Company, wherever situated are liable for the payment of the amount due from the Company on its policies.

An action similar to the ones involved here was begun by Jules Levy, as assignee of a German citizen and subject against the Mutual Life Insurance Company of New York, on or about *the* June 11, 1925, in the District Court of the United States for the Northern District of California. That action was to recover upon a life insurance policy issued

in Germany to a German citizen. The defendant raised the same matters in defense that are raised here, viz.: That the only recovery that could be had was under the German Valorization law and that the policy was payable in marks which were worthless. [441]

Judge St. Sure took jurisdiction of the action and tried the same and finally entered a judgment in favor of plaintiff. The insurance Company appealed to the Circuit Court of Appeals, being case No. 5520, but before the same came on to be heard by the appellate court, the judgment was settled and paid by the defendant.

Among the issues to be tried in these cases are, the amounts due on the policies, the amounts earned by defendant during the life of the policies; the medium in which such earnings were made; the amount of plaintiff's participation in the defendant's profits. The evidence concerning these issues consist of the books of account, and data and documents in the possession of defendant at its office in New York, which books, data and documents are written in the English language. The witnesses whose testimony is necessary to explain the entries in said books reside in New York and all speak and write English. It is much cheaper and more convenient to bring said books and documents and witnesses to Oregon than to take them to Germany.

C. T. HASS.

Subscribed and sworn to before me this 30 day of October, 1930.

[Seal] (Sgd.) IDA BELLE TREMAYNE,
Notary Public for Oregon.

My commission expires 7–10–32.

Filed November 3, 1930. [442]

AND AFTERWARDS, to wit, on Monday, the 1st day of December, 1930, the same being the 19th judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [443]

[Title of Court and Cause—No. L.–10,465.]

ORDER SUSTAINING MOTION TO DISMISS CAUSE AND JUDGMENT.

This cause is now before the Court on motion of the defendant for an order dismissing the same and each cause of action set forth in the amended complaint for lack of jurisdiction of the subject matter thereof, or in the alternative, that the Court in the exercise of its discretion decline to retain and accept jurisdiction of the cause and dismiss the same.

Charles T. Haas and E. B. Seabrook appeared in behalf of the plaintiff and Clark and Clark, and

Huntington, Wilson and Huntington, appeared in behalf of the defendant.

The motion was heard on the files and records of this cause and the affidavit and supplemental affidavit of Dr. Arthur Burchard, the affidavit and supplemental affidavit of A. E. Clark and the affidavits of Walker Buckner and Richard Kruse in support of the motion and the affidavits of Charles T. Haas and Peter A. Schwabe in opposition thereto.

The Court having heard the arguments of counsel and examined the briefs submitted thereby and being advised in the premises,—

IT IS ORDERED that said motion be and the same is hereby allowed;

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that this cause be and the same is hereby dismissed.

Dated at Portland, Oregon, December 1, 1930.

R. S. BEAN,
Judge.

Filed December 1, 1930. [444]

AND AFTERWARDS, to wit, on the 1st day of December, 1930, there was duly filed in said court an opinion, in words and figures as follows, to wit: [445]

[Title of Court and Cause—No. L.-10,465.]

OPINION.

C. T. HAAS and E. B. SEABROOK, Portland, Oregon, Attorneys for Plaintiff.

HUNTINGTON, WILSON & HUNTINGTON, Portland, Ore., and CLARK & CLARK, Portland, Oregon, Attorneys for Defendant.

BEAN, District Judge.—This is one of a series of cases pending in this court against the New York Life Insurance Company and the Guardian Insurance Company, each of which is a New York Corporation, to recover on some two hundred and forty life insurance policies made and issued by the defendants in Germany, in favor of German citizens and subjects, and payable in German marks. The policies of the New York Life Insurance Company were issued prior to August 1, 1914, and those of the Guardian prior to May 1, 1918. As a condition to their right to do business in Germany, the insurance companies were required to and did submit to the supervision and control of the German Insurance officials, to invest the reserves arising from German policies in German securities, and to establish, and they do now maintain an office in that country with a resident representative or agent upon whom service of process can be made. [446]

The actions now pending are brought and prosecuted in the name of or as assignee of the insured by certain parties in the United States and Ger-

many, under an irrevocable power of attorney, by which they are authorized and empowered to sue for, collect, receive and receipt for all sums due or owing under the policies, or compromise the same in consideration of an assignment and transfer to them of the undivided twenty-five per cent (25%) interest in the policies and all rights accruing thereunder.

None of the parties to the litigation are residents or inhabitants of this district. The plaintiffs reside in and are citizens of the Republic of Germany. The defendants are corporations organized and existing under the laws of New York, with their principal offices in that state, with statutory agents in Oregon, upon whom service can be made. None of the causes of action arose here, nor do any of the material witnesses reside in the District, nor are any of the records of the defendant companies pertaining to the policies in suit in the District, but such records are either at the home office in New York, or at their offices in Germany. The courts of Germany and New York are open and functioning and competent to take jurisdiction of the controversies, and service can be made upon the defendants in either of such jurisdictions. To require the defendants to defend the actions in this District would impose upon them great and unnecessary inconvenience and expense and probably compel them to produce here (three thousand miles from their home office) numerous records, books and papers, all of which are in daily use by it in taking care of current business. [447]

In addition it would no doubt consume months of the time of this court to try and dispose of these cases, thus necessarily disregarding the calendar, resulting in delay, inconvenience and expense to other litigants who are entitled to invoke its jurisdiction.

Under these circumstances the defendants, while conceding that the court has jurisdiction of the person and subject matter, urges that it should refuse, in its discretion, to exercise such jurisdiction.

I unhesitatingly concur in this view for, as said by Mr. Justice Holmes in Cuba Railroad vs. Crosby, 222 U. S. 473:

> "It should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs, and remitted them to the place that established and would enforce their rights. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule than that under which the parties dealt."

It is apparent that the plaintiffs are seeking by these actions to impose on the defendants a liability under a different rule than "that under which the parties dealt."

The courts of Germany have ruled that any person seeking to recover on a civil contract made in Germany prior to August, 1924, and payable in marks, can only recover on the basis provided in

the monetary law of 1924. Manifestly the plaintiffs are not proceeding on any such theory. [448]

It is argued by the plaintiffs that because the court has jurisdiction of the subject matter and the parties, it has no discretion but should proceed with the case regardless of where the cause of action arose, or the law by which it is controlled, or the residence or convenience of the parties and witnesses, or the difficulty the court would encounter in attempting to interpret and enforce a foreign contract, or the interference with the other business of the court. But that is a matter resting in its discretion. It may retain jurisdiction, or it may, in the exercise of a sound discretion, decline to do so, as the circumstances suggest. The courts have repeatedly refused, in their discretion, to entertain jurisdiction of causes of action arising in a foreign jurisdiction, where both parties are non-residents of the forum. (32 A. L. R. 1 and note; Pietrario vs. New Jersey & Hudson River, 197 N. Y. 434; Gregonio vs. P. & R. Coal & Ice Co., 235 N. Y. 152; Stewart vs. Litchenberg, 86 Southern 734; Smith vs. Mutual Life Insurance Co., 96 Mass. 336–343; Telephone Co. vs. DuBois, 165 Mass. 117; Collard vs. Beach, 81 Appellate Division, 582; Great Western Railway vs. Miller, 19 Mich. 305; Disconto Gesellschaft vs. Umbreit, 127 Wis. 651.) [449]

As said by Mr. Justice Bradley in "The Belgianland," 114 U. S. 355:

> "Circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as where

> they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals * * * not on the ground that it has not jurisdiction; but that from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not." See also Charter Shipping Co. vs. Bowring, 281 U. S. 515.

These, in my judgment, are cases of that kind, They are actions brought on causes of action arising in Germany. The contract of insurance was made and to be paid there and in Germany currency. It is to be construed and given effect according to the laws of the place where it was made. (22 Am. & Eng. Ency. of Law, 2d Ed., 1350.) The courts of this country are established and maintained primarily to determine controversies between its own citizens and those having business there, and manifestly the court may protect itself against a flood of limitation over contracts made and to be performed in a foreign country, where the parties and witnesses are nonresidents of the forum, and no reason exists why the liability, if any, cannot be enforced in the courts of the country where the cause of action arose, or in the state where the defendant was organized and has its principal offices. True the courts of New York have declined to exercise jurisdiction over actions brought on insurance policies similar to those in suit (Higgins vs. N. Y. Ins. Co., 220 Appel. Div. 620, and Von-Nessen-Stone vs. N. Y. Life Ins. Co., not reported).

But that affords no reason why this court should do so. It is to me unthinkable that residents and citizens of Germany may import bodily into this court numerous actions against a nonresident defendant, [450] on contracts made and payable in Germany, and insist as a matter of right that, because it has obtained jurisdiction of the defendant by service of its statutory agent the taxpayers, citizens and residents of the District having business in the court should stand aside and wait the conclusion of the case, where, as here, the courts of Germany and of the home state of the defendant are open and functioning.

Judge Tucker, in the State Court of Multnomah County, in an able and well-considered opinion in a case brought on one of the German policies (Kahn vs. New York), reached the same conclusion.

Motion allowed.

Filed December 1, 1930. [451]

AND AFTERWARDS, to wit, on the 28th day of January, 1931, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [454]

[Title of Court and Cause—No. L.–10,465.]

PETITION FOR APPEAL.

To the Honorable Judge of the Above-entitled Court:

The above-named plaintiff, Henry Heine, feeling aggrieved by the judgment rendered and en-

tered by the above-entitled court in the above-entitled cause on the first day of December, 1930, wherein and whereby it was ordered and adjudged that the complaint of the said plaintiff be dismissed and that defendant above named recover of and from plaintiff its costs and disbursements incurred herein, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and said plaintiff prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco in the State of California, under the rules of such court in such cases made and provided.

And your petitioner, said plaintiff, further prays that a proper order relating to the required security to be required of him be made.

Dated at Portland, Oregon, this 26th day of January, 1931.

CHARLES T. HAAS,
E. B. SEABROOK,
Attorneys for Said Petitioner and Plaintiff. [455]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely and legal service by copy of the within and foregoing petition for appeal is hereby

admitted at Portland, Oregon, this 28th day of January, 1931.

HUNTINGTON, WILSON & HUNTINGTON,

CLARK & CLARK,

Of Attorneys for Defendant Above Named.

Filed January 28, 1931. [456]

AND AFTERWARDS, to wit, on the 28th day of January, 1931, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [457]

[Title of Court and Cause—No. L.–10,465.]

ASSIGNMENT OF ERRORS.

Comes now Henry Heine, the plaintiff in the above-entitled court and cause, and, contemporaneously with the making and filing of his petition for appeal herein, files therewith the following assignments of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the judgment made by this Honorable Court on the 1st day of December, 1930, to wit:

I.

That the United States District Court for the District of Oregon erred in refusing and failing to rule and decide that said court had jurisdiction of the said cause vested in and imposed upon it by Act of Congress.

II.

That the United States District Court for the

District of Oregon erred in holding and adjudging that said court had a discretion as to whether or not it would retain jurisdiction of said cause.

III.

That the United States District Court for the District of Oregon erred in rendering and entering said judgment on the first day of December, 1930, wherein and whereby plaintiff's complaint was dismissed.

IV.

That said United States District Court for the District of Oregon erred in refusing to retain jurisdiction of said cause and in refusing to try and determine the issues thereof on its merits. [458]

WHEREFORE the above-named plaintiff and appellant prays that said judgment of the District Court of the United States for the District of Oregon rendered and entered on the first day of December, 1930, be reversed and that a mandate of this Court be entered remanding this cause to said District Court of the United States for the District of Oregon with directions to retain jurisdiction of this cause and to try and determine the issues thereof on the merits.

CHARLES T. HAAS,
E. B. SEABROOK,
Attorneys for Plaintiff and Appellant.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely legal service by copy of the within

and foregoing assignment of errors is hereby admitted at Portland, Oregon, this 28th day of January, 1931.

HUNTINGTON, WILSON & HUNTINGTON,

CLARK & CLARK,

Attorneys for Defendant Above Named.

Filed January 28, 1931. [459]

AND AFTERWARDS, to wit, on Wednesday, the 28th day of January, 1931, the same being the 59th judicial day of the regular November term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [460]

[Title of Court and Cause—No. L.–10,465.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

On motion of E. B. Seabrook, one of the attorneys and of counsel for the plaintiff above named, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein on December 1, 1930, be and the same hereby is allowed and that a transcript of the record of all the proceedings and documents upon which said judgment was based, duly certified and authenticated, as provided by law, be forthwith

transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal be and the same hereby is fixed at the sum of $2,500.00.

Dated this 28th day of January, 1931.

JOHN H. McNARY,
District Judge.

Filed January 28, 1931. [460½]

AND AFTERWARDS, to wit, on the 29th day of January, 1931, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [461]

[Title of Court and Cause—No. L.–10,465.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Henry Heine, by his attorney, as principal, and Metropolitan Casualty Insurance Company of New York, a surety company duly authorized and licensed under the laws of Oregon to do a surety business in the state of Oregon, as surety, are held and firmly bound unto the above-named New York Life Insurance Company, the defendant in the above-entitled court and cause, in the sum of $2,500.00, lawful money of the United States, to be paid to it and its respective successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, per-

sonal representatives, successors and assigns by these presents.

Sealed with our seals and dated this 28th day of January, 1931.

WHEREAS, the above-named Henry Heine, the plaintiff in the above-entitled court and cause, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States for the District of Oregon, rendered and entered in the above-entitled cause on December 1, 1930.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Henry Heine plaintiff herein, shall prosecute his said appeal to effect and answer all damages and costs if he fails to make good his plea, then this obligation shall be [462] void; otherwise to remain in full force and effect.

HENRY HEINE, (Seal)
By C. T. HAAS,
His Attorney of Record,
Principal.

THE METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK.
By HERBERT F. WESTENFELDER,
Attorney-in-fact.

[Seal of the Metropolitan Casualty Insurance Company.]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely legal service by copy of the within and foregoing bond on appeal is hereby admitted at Portland, Oregon, this 29th day of January, 1931.

B. S. HUNTINGTON,
Of Attorneys for Defendant Above Named.

The foregoing bond is approved both as to sufficiency and form this 29th day of January, 1931.

JOHN H. McNARY,
District Judge.

Filed January 29, 1931. [463]

AND AFTERWARDS, to wit, on the 29th day of January, 1931, there was duly filed in said court a praecipe of appellant for transcript of record, in words and figures as follows, to wit: [464]

[Title of Court and Cause—No. L.–10,465.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers and proceedings had in the above-entitled cause, which are necessary to a determina-

tion thereof in said appellate court and especially including therein the following documents:

(1) Original complaint.
(2) Petition for removal from state court.
(3) Order of such removal.
(4) Amended complaint.
(5) Stipulation as to Exhibit "A."
(6) Motion to dismiss.
(7) Judgment order dismissing the action.
(8) Notice of appeal.
(9) Petition for appeal.
(10) Assignment of errors.
(11) Order allowing appeal.
(12) Bond on appeal.
(13) Citation on appeal.
(14) This praecipe.
(15) Omit from said transcript all other papers and documents because they are unnecessary and immaterial to the question presented on the appeal.

Dated January 29th, 1931.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Plaintiff and for Plaintiff-in-error.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely service by copy of the within and foregoing praecipe for transcript of record is hereby

admitted at Portland, Oregon, this 29th day of January, 1931.

B. S. HUNTINGTON,
Of Attorneys for Defendant.

Filed January 29, 1931. [465]

AND AFTERWARDS, to wit, on the 3d day of February, 1931, there was duly filed in said court an amended praecipe of appellee for additional transcript of record, in words and figures, as follows, to wit: [466]

[Title of Court and Cause—No. L.–10,465.]

AMENDED PRAECIPE OF APPELLEE FOR ADDITIONAL TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested and directed to prepare, certify and include in the record in the above-entitled cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, and in addition to the papers and proceedings specified in the praecipe served and filed by plaintiff, a certified copy of the following papers, documents and proceedings in said cause, which are necessary to a consideration and determination of the cause in said Appellate Court, to wit:

(1) The answer of the defendant to the complaint of the plaintiff herein. (Omitting therefrom Exhibit 3 attached to said answer for the reason that said Exhibit 3 is identical with Exhibits "D," "E," "L," "M," "R," and "U" attached to the

affidavit of Dr. Arthur Burchard, herein referred to; and also Exhibit 4 attached to said answer for the reason that the same is identical with Exhibit "I" attached to said affidavit of Dr. Arthur Burchard; and also Exhibit 5 attached to said answer for the reason that the same is identical with Exhibit "J" attached to said affidavit of Dr. Arthur Burchard).

(2) Stipulation filed in this cause stipulating that the answer of the defendant filed to the original complaint should stand as the answer to the amended complaint.

(3) Reply to the plaintiff to the answer of the defendant. [467]

(4) Affidavit of Dr. Arthur Burchard and Exhibits "A," "B," "C," "D," "E," "F," "G," "H," "I," "J," "K," "L," "M," "N," "O," "P," "Q," "R," "S," "T," "U," "V," "W," "X," "Y," and "Z" annexed thereto.

(5) Supplemental affidavit of Dr. Arthur Burchard and Exhibit "A" attached thereto.

(6) Affidavit of A. E. Clark and Exhibit "A" attached thereto.

(7) Supplemental affidavit of A. E. Clark and Exhibits 1, 2, 3, and 4 attached thereto.

(8) Affidavit of Walker Buckner and Exhibits "A," "B" and "C" attached thereto.

(9) Affidavit of Peter A. Schwabe and Exhibits "A," "B," "C" and "D" (being all the exhibits) attached thereto.

(10) Affidavit of C. T. Haas.

(11) Opinion of Judge Robert S. Bean setting

forth his reasons for allowing the motions to dismiss.

(12) This amended praecipe.

That all of the foregoing papers, records and proceedings had in this cause constitute the material record upon which the decision and the judgment of the above-entitled court were based.

Dated this 3d day of February, 1931.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Of Attorneys for Defendant and Defendant-in-Error. [468]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and legal service by certified copy of the within and foregoing amended praecipe and direction for additional papers and proceedings for transmission to the United States Circuit Court of Appeals for the Ninth Circuit is hereby admitted at Portland, Oregon, this 3d day of February, 1931.

E. B. SEABROOK,
Attorneys for Plaintiff and Plaintiff-in-Error.

Filed February 3, 1931. [469]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of

the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 2 to 469, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Henry Heine is plaintiff and appellant and New York Life Insurance Company is defendant and appellee; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and the amended praecipe for transcript filed by the said appellee, and is a full, true and complete transcript of the record and proceedings had in said Court in said cause, in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $80.35, and that the said appellant has paid $8.60 for the portion of the transcript requested by his praecipe for transcript, and that the appellee has paid the sum of $71.75 for the portion of the transcript requested by its praecipe for transcript.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 5th day of March, 1931.

[Seal] G. H. MARSH,
Clerk. [470]

[Endorsed]: No. 6405. United States Circuit Court of Appeals for the Ninth Circuit. Henry Heine, Appellant, vs. New York Life Insurance

Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 13, 1931.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

HENRY HEINE,

Plaintiff and Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant and Appellee.

DESIGNATION OF APPELLANT OF PARTS OF RECORD TO BE PRINTED.

To PAUL P. O'BRIEN, Clerk of the Above-entitled Court:

Appellant, pursuant to Rule No. 23 of the above-entitled court, does hereby make the statement that in the prosecution of the appeal of this cause he intends to rely only upon the following errors, which are set forth in the assignment of errors, to wit:

I.

That the United States District Court for the District of Oregon erred in refusing and failing to rule and decide that said court had jurisdiction

of the said cause vested in and imposed upon it by Act of Congress.

II.

That the United States District Court for the District of Oregon erred in holding and adjudging that said court had a discretion as to whether or not it would retain jurisdiction of said cause.

III.

That the United States District Court for the District of Oregon erred in rendering and entering said judgment on the first day of December, 1930, wherein and whereby plaintiff's complaint was dismissed.

IV.

That said United States District Court for the District of Oregon erred in refusing to retain jurisdiction of said cause and in refusing to try and determine the issues thereof on its merits.

The only legal propositions to be presented by appellant in the appeal are that the said District Court had jurisdiction of the cause vested in it by Act of Congress and was in duty bound to retain jurisdiction; had no discretion whatever as to whether or not it would retain such jurisdiction. And appellant does not raise any question whatever as to the proper exercise by said court of its discretion, in the event it has a discretion in the matter.

Inasmuch as the questions presented by appellant on appeal must necessarily be determined from the complaint and petition for removal, we request that

the following parts of the record only, and no others, be printed in the transcript of record, to wit:

1. Petition for removal.
2. Order of removal.
3. Amended complaint, attaching thereto Exhibit "A," which is attached to the original complaint.
4. Stipulation that Ex. "A," may be deemed a part of amended complaint.
5. Motion to dismiss.
6. Judgment order dismissing the action.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.
10. Bond on appeal.
11. Citation on appeal.
12. Praecipe for the record.

Please omit from the printed transcript of record all other parts of the record because they are immaterial and unnecessary to a determination of the only questions presented on the appeal.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Appellant.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely service by copy of the foregoing document is admitted on this 11th day of March, 1931, at Portland, Oregon.

A. E. CLARK,
By MISS MAPLE, Steno.,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 13, 1931. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6405.

HENRY HEINE,

Plaintiff and Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant and Appellee.

DESIGNATION OF APPELLEE OF ADDITIONAL PARTS OF RECORD TO BE PRINTED.

To Hon. PAUL P. O'BRIEN, Clerk of the Above-entitled Court:

The appellee, pursuant to Rule No. 23 of this court, hereby requests that the following parts of the record be printed in this cause, in addition to the parts of the record designated by the appellant, which the appellee deems essential, material and necessary for the consideration of this cause upon appeal:

(1) All of the papers, documents and proceedings specified in appellee's amended praecipe for transcript (Transcript, p. 466), being more particularly enumerated as follows:

(a) Answer of defendant (appellee) to the complaint herein (Transcript, p. 35), Exhibit (1) at-

tached to said answer (Transcript, p. 78), and Exhibit (2) attached to said answer (Transcript, p. 93).

(b) Stipulation filed in cause that answer of defendant (appellee) filed to the original complaint shall stand as the answer to the amended complaint (Transcript, p. 110).

(c) Reply to the answer (Transcript, p. 114).

(d) Affidavit of Dr. Arthur Burchard (Transcript, p. 137), together with the following:

Exhibit "A" annexed to said affidavit, Trans., p. 187.

Exhibit "B" annexed to said affidavit, Trans., p. 188.

Exhibit "C" annexed to said affidavit, Trans., p. 190.

Exhibit "D" annexed to said affidavit, Trans., p. 192.

Exhibit "E" annexed to said affidavit, Trans., p. 197.

Exhibit "F" annexed to said affidavit, Trans., p. 203.

Exhibit "G" annexed to said affidavit, Trans., p. 206.

Exhibit "H" annexed to said affidavit, Trans., p. 210.

Exhibit "I" annexed to said affidavit, Trans., p. 216.

Exhibit "J" annexed to said affidavit, Trans., p. 218.

Exhibit "K" annexed to said affidavit, Trans., p. 223.

Exhibit "L" annexed to said affidavit, Trans., p. 230.

Exhibit "M" annexed to said affidavit, Trans., p. 239.

Exhibit "N" annexed to said affidavit, Trans., p. 246.

Exhibit "O" annexed to said affidavit, Trans., p. 250.

Exhibit "P" annexed to said affidavit, Trans., p. 256.

Exhibit "Q" annexed to said affidavit, Trans., p. 264.

Exhibit "R" annexed to said affidavit, Trans., p. 272.

Exhibit "S" annexed to said affidavit, Trans., p. 286.

Exhibit "T" annexed to said affidavit, Trans., p. 291.

Exhibit "U" annexed to said affidavit, Trans., p. 294.

Exhibit "V" annexed to said affidavit, Trans., p. 298.

Exhibit "W" annexed to said affidavit, Trans., p. 302.

Exhibit "X" annexed to said affidavit, Trans., p. 311.

Exhibit "Y" annexed to said affidavit, Trans., p. 315.

Exhibit "Z" annexed to said affidavit, Trans., p. 323.

(e) Supplemental affidavit of Dr. Arthur Burchard (Transcript, p. 399), and Exhibit "A" an-

nexed to said supplemental affidavit (Transcript, p. 405).

(f) Affidavit of A. E. Clark (Transcript, p. 339), and Exhibit "A" attached to said affidavit (Transcript, p. 348).

(g) Supplemental affidavit of A. E. Clark (Transcript, p. 416), Exhibit (1) attached to said affidavit (Transcript, p. 422), Exhibit (2) attached to said affidavit (Transcript, p. 424), Exhibit (3) attached to said affidavit (Transcript, p. 425), and Exhibit (4) attached to said affidavit (Transcript, p. 426).

(h) Affidavit of Walker Buckner (Transcript, p. 350), Exhibit "A" attached to said affidavit (Transcript, p. 381), Exhibit "B" attached to said affidavit (Transcript, p. 393), and Exhibit "C" attached to said affidavit (Transcript, p. 396).

(i) Affidavit of Peter Schwabe (Transcript, p. 431) and Exhibits "A," "B," "C" and "D" attached to said affidavit (Transcript, p. 433).

(j) Affidavit of C. T. Haas (Transcript, p. 438).

(k) Opinion of Judge Robert S. Bean setting forth reasons for sustaining motions to dismiss (Transcript, p. 445).

(l) Amended praecipe of appellee (Transcript, p. 466).

Dated this 15th day of March, 1931.

B. S. HUNTINGTON,
W. M. HUNTINGTON,
ALFRED E. CLARK,
MALCOLM H. CLARK,
Attorneys for Defendant and Appellee.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and legal service of the foregoing by receipt of a certified copy thereof, at Portland, Oregon, on this 17 day of March, 1931, is hereby admitted.

SEABROOK & SEABROOK,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Mar. 19, 1931. Paul P. O'Brien, Clerk.

No. 6405

United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,
Attorneys for Appellant.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Appellee.

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United States
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HENRY HEINE,

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NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,

Attorneys for Appellant.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,

Attorneys for Appellee.

STATEMENT

This is a transitory action for damages for the breach of a mutual life insurance policy issued by the Appellee to Appellant. The policy, a copy of which is attached to the Amended Complaint (page 96-116 Transcript), contains a provision for the payment to the assured of a certain surrender value in German marks upon the surrender of the policy after a certain period. The Amended Complaint alleges a tender of a surrender of the policy within the time prescribed by the policy, a demand for payment, and a refusal and failure of defendant to make the payment required by the policy, and that defendant repudiated the contract and refused to be bound thereby. Inasmuch as an American court cannot compel a payment in German marks, as provided for in the policy, but can only make an award in American dollars, damages in such dollars are alleged and sought for the failure of defendant to perform its contract and for its repudiation of the contract.

The action was begun in the Circuit Court of the State of Oregon, for Multnomah County, and thence removed by defendant to the District Court of the United States for the District of Oregon.

In the petition for removal (page 3-4 Trans. Rec.), it is alleged that plaintiff is an alien—a citizen, subject and resident of Germany—and that defendant is a citizen of the State of New York in the United States, viz.; a corporation organized under the laws of the State of New York. Said petition further al-

leges that the said Federal Court had jurisdiction of the cause, the same being a controversy between an alien and a citizen.

In the Amended Complaint it is alleged that defendant is a corporation organized and existing under the laws of the State of New York, and, therefore, a citizen of that State (page 88 Trans. Rec.).

It, therefore, appears on the face of the record that this is a controversy between an alien on one side and a citizen of the State of New York on the other.

After the issues had been completely made up and drawn by the pleadings in the lower court, the defendant filed a motion to dismiss the action on the ground that the lower court had no jurisdiction thereof, or, in the alternative, if the court did have jurisdiction, that the court exercise its discretion by refusing to entertain the action. (Page 147 Trans. Rec.).

On December 1, 1930, the lower court ruled and held that while it had jurisdiction of the cause, yet it also had a discretion as to whether or not it would retain that jurisdiction or whether it would dismiss the action. And said court further exercised said alleged discretion by making and entering a judgment dismissing the action.

The sole and only question presented by this appeal is the correctness of the lower court's decision and judgment that said Court had a discretion as to whether or not jurisdiction should be retained or rejected. The several assignments of error raise and

present no other or different question than the foregoing. The assignments of error assert that the lower court had jurisdiction of the cause imposed upon it by positive law, viz.: Section 41 of Title 28 U. S. C. A., being an Act of Congress, and that said Court had no discretion whatever to decline or refuse that jurisdiction, and that it was its duty to hear and determine the issues of the cause.

SPECIFICATION OF ERRORS

Appellant relies upon the following errors, which are assigned in the Assignment of Errors (page 56 Trans. Rec.), to-wit:

I

That the United States District Court for the District of Oregon erred in refusing and failing to rule and decide that said Court had jurisdiction of the said cause vested in and imposed upon it by Act of Congress.

II

That the United States District Court for the District of Oregon erred in holding and adjudging that said Court had a discretion as to whether or not it would retain jurisdiction of said cause.

III

That the United States District Court for the District of Oregon erred in rendering and entering said judgment of the first day of December, 1930, wherein and whereby plaintiff's complaint was dismissed.

IV

That said United States District Court for the District of Oregon erred in refusing to retain jurisdiction of said cause and in refusing to try and determine the issues thereof on the merits.

ARGUMENT

The lower court, while holding it had jurisdiction of the cause, erroneously further held that it had a discretion as to whether or not it would retain and exercise that jurisdiction.

The Court was lead into that error by a citation of authorities, which said Court followed, in cases where the Court's jurisdiction was not fixed by positive law, but was a matter of comity. Jurisdiction, based solely on comity, is a matter of favor, or as counsel aptly said, of hospitality. And favor or hospitality may or may not be extended in the discretion of the Court. And all the cases upon which the lower court based its ruling are cases of that kind. The principal decision relied on by the lower court is the case of the Belgeland, 114 U. S. 188, in which all the parties, plaintiffs and defendants, were aliens, and therefore, there was no positive law imposing jurisdiction upon the Court, and the only jurisdiction that existed was that of favor or hospitality, i. e., comity.

There is no jurisdiction more positively or directly vested in and imposed upon the federal courts than

is vested and imposed in this case. It is not only statutory but also constitutional.

The United States Constitution, Article III, Section 2, reads as follows:

> "The judicial power shall extend to all cases in law and equity.....between a State, *or the citizens* thereof, and foreign States, *citizens or subjects.*"

The Act of Congress, prescribing the jurisdiction of the District Courts, pursuant to said constitutional provision, provides as follows:

> "The District Courts shall have original jurisdiction as follows:
>
> 1. First: of all suits of a civil nature, at common law or in equity.....where the matter in controversy exceeds $3000.00 and.....(c) is between citizens of a state and foreign states, citizens, or subjects."
>
> Section 41, Title 28 U. S. C. A.

This Constitutional provision and Act of Congress not only, by positive law, imposes jurisdiction upon the District Court, but it manifestly grants the right to a citizen to prosecute and maintain an action in such Court against an alien, *and also grants to an alien a right to institute and maintain an action in said Court against a citizen.*

The refusal of the lower court to entertain this action is a denial to the plaintiff of a right which is expressly granted to him by the Constitution and by said Act of Congress.

To comprehend and realize how far reaching and erroneous is the lower court's ruling, it must be considered that if the Court has a discretion as to whether or not it will exercise jurisdiction in this case, it must have a similar discretion in every case in which jurisdiction is imposed upon it by said Act of Congress. In other words, there is not and cannot be, if this judgment be right, any case which the District Court must entertain, but jurisdiction in every case depends solely upon the idiosyncracies and peculiar whims of the particular judge before whom it may be brought.

It is a long-established rule that comity in every case must yield and give way to positive law.

Where jurisdiction is imposed by positive law, the Court has no discretion whatever and must proceed in a matter properly before it.

Cohen vs. Virginia, 19 U. S. (6 Wheat.) 264, 403.

Wilcox vs. Consol. Gas Co., 212 U. S. 19.

Second Employer's Liability Cases, 223 U. S. 158.

Kline vs. Burke Constr. Co., 260 U. S. 226, 67 L. Ed. 226.

Raich vs. Truax, 219 Fed. 273, affd. 239 U. S. 33.

Southern Cal. Tel. Co. vs. Hopkins, 13 Fed. (2nd), 814-820.

Norris vs. Illinois Co., 18 Fed. (2nd) 584.

Re Thirty-fourth St. R. R. Co., 102 N. Y. 343.

Crane etc. Co. vs. R. R. Co., 131 Misc. 71, 225 N. Y. S. 775.

State vs. Grimm, 239 Mo. 135, 143 S. W. 483.

Kimball vs. Neal, 44 Vt. 567.

Hagerstown B. Co. vs. Gates, 117 Md. 348, 83 At. 570.

This court has recently decided this point adversely to the lower court's ruling in a very similar case, where the district court had held it had jurisdiction but exercised a discretion to decline to entertain the case. Judge Hunt, it seems to us, very clearly put an end to appellee's contention in the following words:

> "As a sequel to what we have said, we hold that the District Court was correct in the opinion that it had jurisdiction and in the intimation that the merits were with the plaintiffs, but we think it erred in declining to exercise jurisdiction. Decision that there was power to hear and determine *removed any question of discretion* and left a bounden duty to proceed to a decree." 13 Fed (2) 814-8

Raich vs. Truax, 219 Fed. 273-284, is an action by an alien against a citizen in which a motion to dismiss was denied by the court on the ground that the jurisdiction was imposed by positive law and the court had no discretion whatever to decline to hear the case but was in duty bound to retain the case, citing Cohen vs. Virginia, supra. This case was affirmed in 239 U. S. 33, but without opinion on this point.

In Wilcox vs. Consol. Gas Co., supra, Mr. Justice Peckham very clearly states the rule as follows:

> "They assume to criticize the Court for tak-

ing jurisdiction of this case, as precipitate, *as if it were a question of discretion or comity,* whether or not the Court should have heard the case. *On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction."*

In Second Employer's Liability cases, 223 U. S. 1-58, the court said:

> "The existence of the jurisdiction creates an implication to exercise it, and that its exercise may be onerous does not militate against the implication."

Justice Andrews of the Court of Appeals of New York also concisely states the doctrine as follows:

> "When either by Constitution, or by statute, jurisdiction is conferred upon a court, the Court cannot entertain or decline jurisdiction in its discretion. It is bound to exercise it when the case arises and its exercise invoked by a party interested and having the right to make the application."
>
> Re Thirty-fourth St. R. R. Co., 102 N. Y. 343-353.

An examination of the authorities cited and relied on by the lower court will demonstrate at once that none of them is a case where the jurisdiction was imposed by positive law—by a constitutional or statutory enactment. They fall into two classes: Federal decisions where the parties on both sides of the controversy were all aliens and therefore the jurisdiction depended solely on comity; and state decisions, either

in state courts, or on appeal from such state courts, where all the parties were non-residents of the state, and there was no state statute vesting or imposing jurisdiction.

This record shows the following facts: The cause of action is a transitory one; the amount in controversy exceeds $3000.00; the plaintiff is an alien, a citizen and subject of a foreign state, viz: Germany; and the defendant is a corporation of the state of New York and a citizen of the United States, and is doing business in Oregon according to the laws thereof. These facts bring the case squarely within Section 41, Title 28, sub. 1, clause (c) U. S. C. A., which imposes jurisdiction upon the district court and confers upon plaintiff the right to sue and maintain the action in the district court.

Since the decision of the Wilcox case in the United States supreme court, and the Southern California Tel. Co. case in this court, there does not appear to be any reasonable ground of debate as to whether or not a court has any discretion in the matter of exercising jurisdiction in a case where the jurisdiction is imposed upon and vested in the court by positive law.

Neither can there be any doubt but that the provisions of Sections 41 and 71, U. S. C. A., imposes upon the lower court jurisdiction of this action.

Where there is a positive statute conferring and imposing jurisdiction, there is, of course, by reason of the statute, a fixed rule governing the jurisdiction. And it follows that in such case there can be no power of choice or discretion lodged in the court.

In Gregonis vs. P. & R. Coal & Ice Co., 235 N. Y. 152—a case cited and relied on by the lower court, but which does not sustain the lower court's view—the court said:

> "Discretion implies a power to make a choice."

In the recent decision of Langnes vs. Green, decided by the U. S. supreme court on February 24, 1931, on certiorari from this court, Justice Sutherland said:

> "The term 'discretion' denotes the absence of a hard and fast rule."

When there is a statute which imposes jurisdiction, there is a "hard and fast rule," and there is no power to make a choice. When there is no"hard and fast rule," then there is a power to choose and a discretion. It is a contradiction in terms and principles to say that the act of congress has conferred jurisdiction, but that the court has, nevertheless, a discretion as to whether or not it will exercise such jurisdiction.

The lower court has erroneously exercised a discretion and a choice in this case although it is governed by a "hard and fast rule," viz: The act of congress which imposes jurisdiction on the district court. And in doing this the lower court mistakenly relied upon decisions in cases which are not controlled by any "hard and fast rule," but, instead, are cases where the jurisdiction is based solely upon the principle of comity.

We shall presently refer to the authorities cited in the lower court's opinion and show that they are all cases of the character last above referred to.

It has been suggested, however, that a want of jurisdiction in the district court of Oregon arises under Section 112 U. S. C. A. from the fact that the place of residence or domicile of defendant is in the state of New York, and that, therefore, original jurisdiction of the cause would be in the district court for the District of New York. If this were true, manifestly, the lower court would have no power to dismiss the action, but could only remand it to the state court from whence it was removed.

There is, however, nothing in the suggestion, and the provisions of Section 112 U. S. C. A. have been judicially determined to be not jurisdictional.

The provision of said Section 112, which has been referred to, is as follows:

> "and, except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant."

It was formerly assumed that Ex parte Wisner, 203 U. S. 449, 27 S. Ct. 150, was authority for the proposition that a compliance with said Section 112 was jurisdictional, so that a cause commenced against a non-resident in a state court could not lawfully be removed to the federal court of that state, but must be remanded to the state court for want of jurisdiction in that federal court. It was also thought that in the case of In Re Moore, 209, U. S. 490, 28 S. Ct. 585, that rule was somewhat modified.

Several decisions were rendered in the lower federal courts in which cases of this kind were remanded to the state court for want of jurisdiction. An example may be found in the case of Decker vs. Southern Co., 189 Fed. 224.

But the mooted question was finally set at rest, first by this court, and afterwards by the supreme court of the United States.

This court in Kantalla Co. vs. Rones, 186 Fed. 30, settled the point that the provisions of Section 112 were not jurisdictional but were for the benefit of the defendant, and could be waived by defendant, and were in fact waived by defendant when defendant sought the jurisdiction of the federal court by removing the cause thereto.

This decision preceded by half a decade the action of the United States supreme court, but when the question did arise in that court it was decided in precisely the same way as this court had formerly announced.

Lee vs. Chesapeake Co., 260 U. S. 653, 43 S. Ct. 230.

General Inv. Co. vs. Lake Shore etc. Co., 260 U. S. 261, 43 S. Ct. 106.

Great Northern Co. vs. Galbreath Co., 271 U. S. 99, 46 S. Ct. 439.

Note 76 to Section 71, Title 28 U. S. C. A.

It is now established both by the U. S. Supreme Court and by this court, that a compliance with said Section 112 is not jurisdictional; that the provisions

of that section are for the benefit of defendant, who may waive a compliance therewith; and that defendant, by removing a cause to a federal court of a district other than that of his domicile, does waive the requirement that he must be sued only in the district whereof he is an inhabitant.

The courts have never looked with favor upon a suitor who invokes the jurisdiction of a court and then makes objection that such court has no jurisdiction to entertain the cause.

In Fisher vs. Shropshire, 147 U. S. 133, 13 S. Ct. 201, it is said:

> "The suit was removed into the Circuit Court of the United States by defendant John Lyle and having done that, he then contended that the Court had no jurisdiction because George Lyle was an indispensable party defendant and he was a citizen of the same State as complainants. *We do not think this will do....we are not prepared to hold that the Circuit Court should be deprived of jurisdiction at the suggestion of the party who voluntarily invoked it.*"

In the case of In Re Moore, 209 U. S. 490, 28 Sup. Ct. 585, Justice Brewer said:

> "That defendant consented to accept the jurisdiction of the United States Court is obvious. It filed a petition for removal from the State Court to the United States Court. No clearer expression of its acceptance of the jurisdiction of the latter court could be had."

In the present case the defendant filed a petition for removal in which it alleged the existence of all

essential facts to invoke the jurisdiction of the lower court and in which it alleged that the lower court had jurisdiction of the case, and pursuant to such petition this case was removed to the lower court and its jurisdiction was invoked. Thereupon the defendant, having the case lodged in the lower court, filed a motion to dismiss it—not to remand it to the court from whence it was removed, but to dismiss it absolutely—on the ground that the lower court was without jurisdiction to hear it, or, at least, should not, in the exercise of a discretion, entertain the case at all. The success of that motion was a shock to our sense of equity and fairness.

It seems to us that if the district court is to possess the power of taking a case from the state court, which had jurisdiction of it (State ex. rel. vs. Tazwell, 125 Or. 528), for the purpose of absolutely dismissing it, without trial on the merits, on the ground of want of jurisdiction, such power should appear by express grant in some act of congress. There is no such power. If the lower court had no jurisdiction, or declined to entertain the case, it should remand it to the court from whence it was removed.

At this point we deem it proper to substantiate our statement that the authorities relied on by the lower court do not apply to a case where the jurisdiction is conferred by positive law—by a statute or a constitution—but apply only in admiralty and other cases where the jurisdiction depends solely on the principle of comity. The following is a complete list

of all the decisions cited and relied on by the lower court, viz.:

1. Cuba R. R. vs. Crosby, 222 U. S. 473.
2. Pietrario vs. N. J. & H. R. Co, 197 N Y. 434.
3. Gregonis vs. P. & R. Coal & Ice Co., 235 N. Y. 152.
4. Stewart vs. Litchenberg, 86 So. 734.
5. Smith vs. Mutual Life Ins. Co., 96 Mass. 336.
6. Telephone Co. vs. DuBois, 165 Mass. 117. 343.
7. Collard vs. Beach, 81 App. Div. (N. Y.) 582.
8. Great Western Ry. vs. Miller, 19 Mich. 305.
9. Disconto Gesellschaft vs. Umbreit, 127 Wis. 651.
10. The Belgeland, 114 U. S. 355.
11. Charter Shipping Co. vs. Bowring, 281 U. S. 515.
12. Higgins vs. N. Y. L. Ins. Co., 220 App. Div. (N. Y.) 620.
13. Van Niessen-Stone vs. N. Y. L. Ins. Co. (Not reported.)
14. Opinion of Judge Tucker of the Oregon Circuit Court.

The first of these decisions—Cuba R. R. vs. Crosby—has no bearing on the question involved here, because in that case no discretion was exercised or the exercise of it requested or denied. Jurisdiction was taken and the cause was tried on its merits, although it is a controversy between aliens. The supreme court did not decide whether or not the lower court had a discretion, but passed upon

the correctness of a ruling of the lower court in instructing the jury. The tort, which was the subject of the action, occurred in Cuba. The laws of Cuba giving a cause of action for the tort had not been proven in the case; and the lower court instructed the jury that the laws of Cuba would be presumed to be the same as those of the forum. This the supreme court said was error, under the well settled rule that such presumption exists only as between states, but not as between a state and a foreign country. There is nothing whatever in this decision which sustains the lower court in refusing jurisdiction in a case where the jurisdiction is imposed by positive law.

The second case—Pietrario vs. N. J. & H. R. Co.—concerns a controversy between non-residents of New York, on a cause of action arising outside of that state, and there was no statute conferring jurisdiction on the courts of New York. The jurisdiction was based on comity and not by positive law. The decision would be applicable if the *state court* here had exercised a discretion to dismiss the action, and there was no Oregon statute imposing jurisdiction on the Oregon state court. But the state court did not take any such action, and the fact is there is an Oregon statute imposing jurisdiction on the Oregon courts, as this court has already decided. The question before this court is whether the *federal district court* below may decline jurisdiction, and not what the *state court* might have done, but did not do.

The third case—the Gregonis case—holds, as we view it, exactly contrary to the lower court's ruling.

That decision is to the effect that the lower court had no discretion or power to dismiss the cause, because the jurisdiction was conferred by positive law. One of the parties was resident of New York. This sustains our view. The defendant here is a citizen and resident of the United States. If Judge Bean is right in ruling that the district court of the United States has a discretion to decline jurisdiction of a cause where the defendant is a citizen and resident of the United States, and there is an act of congress conferring jurisdiction in such case, then the court of appeals in the Gregonis case should have ruled that the New York lower court had a similar discretion in that case. That court, however, correctly ruled that the statute disposed of the discretion and the court had no power to choose. And we say again that no case can be found which holds that a court upon which jurisdiction is conferred by positive law, has any power to decline jurisdiction.

The fourth case—Stewart vs. Litchenberg—is a Louisiana decision in a controversy between residents of the state of Nebraska, upon a cause arising in Nebraska, and there was no statute conferring jurisdiction upon the Louisiana courts. Another case of comity.

The fifth case—Smith vs. Mutual Life Ins. Co.—is also a controversy between non-residents. Plaintiff was a resident of Alabama and defendant a New York corporation. The cause arose outside of the state of the forum, and there was no statute conferring jurisdiction. A case of comity.

The sixth case—Telephone Co. vs. DuBois—is also a controversy between non-residents and there was no statute conferring jurisdiction. The court in that case expressly said that the jurisdiction was based on comity.

The seventh case—Collard vs. Beach—is another case of the same kind. Both parties were non-residents and there was no statute conferring jurisdiction. Another comity case.

The eighth case—Great Western Ry. vs. Miller—is an action by a resident of Canada against a Canadian corporation, on a cause which arose in Canada, and there was no statute conferring jurisdiction. Still another comity case.

The ninth case—Disconto Gesellschaft vs. Umbreit—which was affirmed by the U. S. supreme court in 208 U. S. 570, 52 L. Ed. 625, is another comity case. All parties were aliens and there was no statute conferring jurisdiction.

The tenth case—The Belgeland—is an admiralty case in which all the parties are aliens and there was no statute conferring jurisdiction. The judiciary act of congress does not confer jurisdiction on the district courts in cases between aliens. This is another comity case.

The eleventh case—Charter Shipping Co. vs. Bowring—is another admiralty case between aliens, and the jurisdiction was based solely on comity.

The twelfth case—Higgins case—is a memorandum decision without opinion or statement of facts.

The thirteenth case—Van Niessen-Stone case—is not even reported.

Not knowing officially anything about these last two cases we can make no comment further than to say that if they do in fact sustain the doctrine that a court upon which a controlling statute has imposed jurisdiction, may retain or refuse that jurisdiction in its discretion, such decisions are of no weight whatever. They are decisions by an inferior court directly opposed to the rulings of the court of last resort, the court of appeals, in the Gregonis case and in a very recent case decided February 10, 1931, viz: The case of The Matter of the People by James A. Beha, in re the claim of G. Frank Dougherty. In the last mentioned decision the court of appeals reversed the lower court for dismissing the claim of an alien on an insurance policy issued in Russia. And they are also opposed to Justice Andrew's decision in 102 N. Y. 353.

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In the cases relied on by the lower court none of the parties were residents within the jurisdiction of the court. In the federal decisions the parties were aliens. In the state court cases the parties were non-residents of the state. This case involves the jurisdiction of the federal district court, whose power extends throughout the whole United States. The lower court seems to have overlooked the fact that the defendant is a citizen and resident within the jurisdiction of the district court, and also the fact that congress has by express act conferred jurisdiction on the lower court. The cases cited would apply if both the

parties here were aliens. But such is not the case. The defendant is a citizen of the United States.

We now come to the fourteenth and last authority relied on by the lower court, i. e., the opinion of Judge Tucker in the case of Kahn vs. N. Y. L. Ins. Co.

The lower court's opinion very clearly shows that the distinction between jurisdiction imposed by positive law and jurisdiction based on comity was overlooked and not considered. It is only in the latter instance that a court has a discretion, and it has none whatever in the former. Yet the lower court assumed in this case, which is a case where the jurisdiction is imposed by positive law, a discretion that only exists in cases where the jurisdiction is a matter of comity. The lower court assumed it has a discretion in every case that might be brought before it as to whether or not it would entertain the case, because there can be no case where the jurisdiction is more clearly imposed and vested by positive law than in this one.

The failure of the lower court to recognize or consider the distinction between the vesting of jurisdiction by positive law, and the exercising of it as a matter of comity, is clearly seen in the citation of Judge Tucker's opinion in the Kahn case. Judge Tucker marked and considered the distinction we have mentioned and expressly made his opinion dependent upon the fact that the case before him was entertained solely as a matter of comity and not because of positive law. In his opinion he said:

> "This action is entertained not upon the principles accorded to citizens of the United States by the fundamental law, but upon the principle of comity."

Judge Tucker's view was that the court had a discretion because the jurisdiction was solely a matter of comity, but the lower court enlarges upon that and assumes a discretion in a case where jurisdiction is imposed by positive law. Certainly Judge Tucker's opinion is no authority for that.

Whatever may be the fact in the Kahn case as to whether or not the jurisdiction was a matter of comity, Judge Tucker said that it was and his opinion is based entirely on that hypothesis. In that respect, however, Judge Tucker was wrong because at the very time he rendered his opinion he, or the court of which he was judge, was under mandate of the Oregon supreme court to try and determine the Kahn case upon its merits. State ex rel. vs. Tazwell, 125 Or. 528.

There can be no question but that the state court in this case had jurisdiction imposed by positive law. The action is a transitory one and both parties are non-residents of Oregon. In such cases Section 44 Oregon Laws (1920 Code) vests jurisdiction in the circuit court of any county in the state selected by the plainitff.

This court in the case of Denver, etc. Co. vs. Roller, 100 Fed. 738, construed a California statute identical with said Section 44 of the Oregon code, and held that it imposed on the California courts jurisdiction of

a transitory action wherein the parties on both sides were non-residents of the state.

But it is not a discretion in the state court which is the subject of this appeal. The state court did not assume any such discretion. The question is whether or not the district court below had a discretion to dismiss without trial on the merits an action which was properly before it wherein the controversy was between an alien on one side and a citizen of one of the United States on the other side, and the amount involved exceeded $3000.00 and the action was transitory in character.

The plaintiff has been granted, by the act of congress, a right to maintain his action in the district court, and to turn him out of court now with the injunction to commence his action in the New York district, is to deny him any right whatever and to deprive him of his cause of action. In the meantime the statute of limitations has run against his action, and it is cold comfort indeed to suggest that he now begin it in the district court for the district of New York by original process.

It is respectfully submitted that the judgment of the lower court should be reversed and a mandate be sent down to the court below requiring it to hear and determine this action on its merits.

Respectfully submitted,

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Appellants.

No. 6405

United States Circuit Court of Appeals

For the Ninth Circuit

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon

HON. R. S. BEAN, JUDGE

C. T. HAAS AND E. B. SEABROOK,
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Appellee's Brief

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APPELLEE'S CONTENTIONS

May be thus summarized:

First. That, upon the undisputed facts disclosed by the affidavits supporting the motion, it was within the sound discretion of the lower court to dismiss this ac-

tion, brought in Oregon by an alien resident of Germany against a New York corporation, upon an insurance contract issued in Germany, in the German language, subject to German law, payable and otherwise performable in Germany, and both parties to the action being subject to the jurisdiction of the courts and other tribunals of Germany;

Second. That the venue stipulation in the policies, specifying certain German courts as having exclusive jurisdiction of all disputes arising thereon, were made pursuant to German law, are fair and reasonable and should be given effect;

Third. That the appellee and all its assets located in Germany are under the supervision of the German government, and the rights and remedies which appellee is required to give, and to which the appellant and all other holders of German insurance policies are entitled, under German currency and valorization laws and decrees, are special and administrative in character and are not such as the American courts are competent to administer.

STATEMENT

This action was brought in the Circuit Court of Multnomah County, Oregon, and was removed by the appellee to the Federal Court. The original complaint (Trans. Rec. 2-a) and the amended complaint (Trans. Rec. 88) set up three causes of action, each based on an insurance policy issued in Germany to a German citizen, written in the German language and payable in Germany in the currency of that country. A copy of one of the policies is attached to the answer (Ex. 1, Trans. Rec. 54). The complaint alleges that the other two policies are identical except as to policy numbers (Trans. Rec. 91-93). In each of the causes of action appellant seeks to recover alleged cash surrender values. The reply filed seems to be drawn on the theory that appellant is entitled to a general accounting from the appellee (Trans. Rec. 120-126).

An answer was filed denying liability; setting up the stipulation in each policy designating certain specified German courts as having exclusive jurisdiction; pleading novation in that that Kronos Deutsche Leben-Versicherungs Aktien-Gesellschaft, referred to in the record as "Kronos", assumed the liability of the appellee under the policies, upon an agreement assented to by the appellant, that appellee should be released from liability; pleading the currency legislation of Germany, both before and after the war; the valorization laws, the steps taken by the German authorities to valorize or rate up certain classes of contracts payable in marks, including

insurance policies issued by the appellee in Germany; the agreement reached between the appellee on one hand and the German insurance authorities representing the German policyholders on the other, by which a valorization fund was established and placed in the custody of the German insurance authorities to pay and adjust all claims on policies issued by the appellee in Germany, including the policies involved in this case; and other matters (Trans. Rec. 8).

The appellee moved (Trans. Rec. 147):

> "For an order dismissing this action, and each cause of action stated in the amended complaint for lack of jurisdiction of the subject matter thereof, or, in the alternative, that the court in the exercise of its discretion decline to accept and retain jurisdiction of this action and dismiss the same."

This motion was based on the pleadings and records, and upon the following:

(a) Affidavit of Dr. Arthur Burchard (Trans. Rec. 148) and Exhibits "A" to "Z", inclusive, attached thereto (Trans. Rec. 215-414), consisting of copies of German laws and decisions of the German courts and the German Federal Insurance Board for Private Insurance;

(b) Supplemental affidavit of Dr. Burchard (Trans. Rec. 502) and Exhibit "A" attached thereto

(Trans. Rec. 508), being a decision of the German Supreme Court rendered May 27, 1930;

(c) Affidavit of Walker Buckner (Trans. Rec. 445) and Exhibit "A" (Trans. Rec. 479) attached thereto, being a decision of the German Federal Insurance Board rendered February 12, 1930, fixing the amount of the contribution appellee should make to the valorization fund for the payment of all policies issued by appellee in Germany; Exhibit "B" (Trans. Rec. 493) attached thereto, which is the distribution plan established by the German Federal Insurance Board for the insurance policies issued by the appellee in accordance with the German valorization laws, and Exhibit "C" (Trans. Rec. 498), which is a table of the percentages of the gold mark value at which the policies of the various companies are to be rated up or valued. Something like fifty companies are listed, among which is the appellee (Trans. Rec. 500);

(d) Affidavit of A. E. Clark, one of the attorneys of record for the appellee (Trans. Rec. 432), and Exhibit "A" (Trans. Rec. 440) thereto attached, which is a copy of the agreement under which certain persons represent and have agreed to prosecute litigation in behalf of various German policyholders, and to receive a proportion of the recovery for their services and outlays;

(e) Supplemental affidavit of A. E. Clark (Trans. Rec. 526) and Exhibits 1, 2, 3 and 4 attached thereto, to which reference will be hereafter made.

Affidavit of Richard Kruse and exhibits attached thereto, which have been omitted from the record on appeal for the reason that the affidavit simply stated that the exhibits attached to it were true copies of the policies of insurance issued to appellant. Inasmuch as a copy of one policy was attached to the answer and the others were similar, the Kruse affidavit was merely repetitious.

Dr. Arthur Burchard is a distinguished German lawyer and jurist (Trans. Rec. 148). Mr. Walker Buckner is vice-president of appellee, and for many years prior to 1915 was stationed in Europe in charge of its European business. Upon his return to America he remained in charge of the European business, and in 1928, 1929 and 1930 conducted for appellee the conferences with the German Insurance Board with regard to the fund to be, and which was, provided by the appellee under the valorization laws of Germany to liquidate all policies issued by the appellee to citizens of Germany (Trans. Rec. 445).

These affidavits stand admitted. Nothing contained in them or in the exhibits attached thereto was denied or contradicted by affidavits filed in behalf of the appellant or otherwise.

Two affidavits were filed by appellant in opposition to the motion. One is the affidavit of Mr. Peter A. Schwabe, of Portland, associated in the law business with Mr. C. T. Haas, one of the attorneys for the ap-

pellant. He merely averred that certain exhibits attached to his affidavit were correct translations into English from the German language (Trans. Rec. 543). The exhibits attached to his affidavit are Exhibit "A", a brief statement of the business of the appellee in Germany for 1914, made up at the Berlin office; Exhibit "B", a circular letter sent out with the copy of said statement from the Berlin office; Exhibit "C", what appears to be a circular letter sent out from the Berlin office in March, 1917, and Exhibit "D", circular sent to German policyholders from the German office in March, 1918. The other affidavit filed by the appellant was that of Mr. C. T. Haas (Trans. Rec. 552). It recites that he understod that the documents referred to in the affidavit of Mr. Schwabe were sent out to German policyholders, then refers to a decision of the Supreme Court of Oregon, also decision of the Supreme Court of the United States which apparently held that the New York courts were within their rights in declining to entertain jurisdiction of a controversy between non-residents on a cause of action arising elsewhere, quotes from certain sections of the New York Code of Civil Procedure, and mentions some other matters which neither directly nor indirectly challenge anything contained in the affidavits filed by appellee.

The practice followed in bringing the matters contained in the motion and affidavits to the attention of the court was not questioned; the motion was heard upon the merits. It was stipulated that the affidavits used in

this case, both in support of and in opposition to the motion, should be considered as a part of the record in the case of Hermann versus New York Life Insurance Company, now on the docket of this court as No. 6406.

Each policy involved in this case was issued at the Berlin office (Trans. Rec. 54). Mr. G. Nimptach, general representative of appellee in Germany, and Mr. Schlesier, secretary for Germany of appellee, personally signed the policies in Berlin and these were the last signatures affixed. The policies were written entirely in the German language and were delivered to the insured in Germany. All premiums were payable in German currency at the Berlin office and all amounts payable to the insured or other beneficiary under the policies were also payable at the Berlin office (Trans. Rec. 446, 447). Each policy provided that it should take effect only after delivery to the insured (Trans. Rec. 56) and that all authority with respect thereto was to be exercised by the chief representative of the appellee for Germany (Trans. Rec. 57). At the time the policies were issued appellant was a resident in and subject of the German Empire and has since continued to reside in Germany (Trans. Rec. 447).

Mr. Buckner further states in his affidavit (Trans. Rec. 451):

> "The defendant is organized under the laws of the State of New York, where it has its principal office and place of business. There are no witnesses to any of the transactions involved in

this action resident in the State of Oregon. Practically all of the witnesses thereto reside in Germany and those who do not reside in Germany, are residents of the State of New York. None of the records of the defendant relating to any of said transactions is, or ever has been, in the State of Oregon. All of defendants' original data, correspondence and documents relating to defendant's business in Germany and policies issued there were kept in Germany and are still in Germany in the possession of the 'Kronos' Life Insurance Company, hereinafter referred to, except when defendant is able to obtain them for use in connection with litigation in America upon said German policies. To defend this action in the courts of Oregon would impose upon the defendant great and unnecessary difficulty, inconvenience and expense."

Thus it appears that the appellant is a non-resident alien, a resident and citizen of Germany. The appellee is a non-resident, a New York corporation, having its principal office in the State of New York. The causes of action, if any exist, arose seven or eight thousand miles from Oregon, in a foreign country, having a different language, different laws, and a different system of jurisprudence. These causes have been imported into Oregon without apparent reason or excuse. The appellant is not physically here, but in Germany. None of his witnesses is here. There are no witnesses to any of the transactions here involved resident in the State of Oregon. The situs of every fact connected with the

insurance is in Germany except the facts that the appellee has its home office in New York and that this action is brought in Oregon. None of the records relating to any of the transactions involved is, or ever has been, in the State of Oregon. Practically all of the appellee's original data and correspondence and documents relating to the policies in this action and all of the other German policies were kept in Germany and are still there.

Consideration of the foregoing facts makes pertinent the remark made in an action brought in a Scottish court on behalf of some English underwriters, against a French steamship company on a contract entered into in France, written in the French language and relating to transactions there occurring. The trial court declined to retain jurisdiction and remitted the plaintiff to the courts of France. The House of Lords sustained the dismissal, the Lord Chancellor remarking:

> "From the beginning to the end of the case there is not a breath of Scottish atmosphere."
>
> *Societie du Gaz vs. Les Armateurs Francais,* H. C. 13 (1926 Sess. Cas.).

So in this case, from the beginning to the end there is not a breath of Oregon atmosphere.

Mr. Buckner states (Trans. Rec. 449-451):

> "At all times since 1904 defendant has maintained and now maintains and intends to continue to maintain in Germany a general repre-

sentative and attorney-in-fact appointed pursuant to the aforesaid §115 of said laws of Germany Relating to Private Insurance Enterprises (Trans. Rec. 75-85) and upon whom process issued out of any of the courts of Germany and directed to defendant might be served. During the past few years many hundreds of actions have been commenced in Germany against defendant upon mark policies issued by defendant in Germany. In substantially all of those actions service of process has been made upon the defendant's general representative and attorney-in-fact in Germany. In no action commenced in Germany on a mark policy issued in Germany has defendant sought to evade the jurisdiction of the German courts or to invalidate service made in Germany upon defendant's said representative in Germany. In all of said actions, i. e., upon mark policies issued by the defendant in Germany, the German courts have assumed jurisdiction (so far as any justiciable issue was presented therein) and those actions have either been disposed of or are still pending in the German courts.

* * * * *

"The courts of Germany have at all times been, and now are, open and functioning, competent and ready to take jurisdiction of any justiciable controversy based upon or arising out of the policies upon which this action is based, or based upon or arising out of any and all policies issued by the defendant in Germany."

Copies of the decrees and judgments of the German

courts and other tribunals, attached as exhibits to the affidavit and supplemental affidavit of Dr. Arthur Burchard, and the affidavit of Mr. Buckner, disclose that within the past two or three years the appellee has been before the German courts and tribunals in various matters. Exhibit "K", attached to the affidavit of Dr. Burchard (Trans. Rec. 258) is a decision of the German Insurance Board under date of October 25, 1928. The appellee appeared in the proceeding, which was to determine whether appellee was a supervised company within the meaning of the valorization laws. It was held to be a supervised company and therefore subject to the valorization laws. The decision recites the activities of appellee in Germany, names various general agents who from time to time were appointed, up to and including Julius Kahn, of Frankfort, appointed May 19, 1928; refers to the fact that appellee sought to withdraw from Germany and cancel the power of attorney to its general representative in 1924, but, this action being protested by the German Insurance authorities, it was withdrawn, and it was pointed out that under the German Insurance law the power of attorney and the authority of the general representative, once appointed, could not be terminated without the consent of the German government, which was never given (Trans. Rec. 258, 259, 260, 261). Exhibit "L", attached to the affidavit of Dr. Burchard (Trans. Rec. 272), is the decision of the Appellate Division rendered February 13, 1929, affirming said decision of the German Insurance Board of October 25, 1928, supra. Again the appellee was

present. The Appellate Division reviewed the history of the activities of the defendant, pointed out that it was then, and at all times theretofore had been, under the supervision of the German Insurance Board, that it then had an office and general representative or attorney in fact in Germany, referred to the fact that appellee had large assets in Germany in addition to those transferred to Kronos, and remarked:

> "As the court below expressly stated, the company always fulfilled every order of the German Insurance Board." (Trans. Rec. 280.)

Exhibit "O", attached to the affidavit of Dr. Burchard (Trans. Rec. 298) is a decision by the Supreme Court of Germany under date of March 12, 1930, in the case of Messerschmitt against the defendant. It is there stated that the appellee at the time of the hearing in March of 1930 had its principal branch or office in Germany at Frankfort, and that among those representing it on the hearing was its chief agent for Germany.

So it appears that appellee is in Germany, that under the German insurance laws it was required to and did elect a legal domicile in Germany, as to all German business; that it is subject to the processes of its courts, that it is under the supervision of the German Insurance Board and is meeting all orders of that Board and the requirements of the valorization laws of Germany relating to the policies involved in this action and all other policies issued by appellee to German nationals, and that not only has it made all the contributions

which the German government has exacted to meet the requirements of the valorization laws, but it also owns in Germany large additional assets.

The affidavit of A. E. Clark (Trans. Rec. 432) discloses that there are now pending in the District Court of the United States, for the District of Oregon, against appellee a number of cases, involving 192 policies, issued to German citizens who now reside, and at all times have resided, in Germany, written in the German language, payable in Germany in German currency, and subject to German law. There are also pending in the same court, against the Guardian Life Insurance Company, cases involving fifty policies. There are pending in the Circuit Court of the State of Oregon, for Multnomah County, against appellee and the Guardian Life Insurance Company, cases involving eighteen policies.

Paul Hermann, of Heidelberg, Germany, is plaintiff in many of these cases. For instance, in the case of Hermann versus appellee, No. L-10489, pending in the District Court of the United States, there are involved 115 policies and 115 separate causes of action. There is another case brought by him, involving 39 policies issued to different persons, another one involving 14 policies, and others a less number.

It might be interesting to inquire why these litigations were exported from Germany and imported to Oregon.

Before any cases were brought in Oregon on these

German insurance policies, two cases were brought against the appellee in its home state, New York, on policies issued in Germany under circumstances common to all of the German policies. The New York courts on motion declined to retain jurisdiction and dismissed the actions. We will later refer more at length to these two cases, the Higgins case and the Von Nissen-Stone case. After the New York courts had declined to retain jurisdiction of these actions, Oregon for some reason was selected as the field for the next attempt to foist on the American courts many thousands of cases on German policies, not because the German policyholders could not get a hearing or get justice in the tribunals of their own country, but undoubtedly because they hoped that the American courts might be led, or misled, into giving them much more than they could obtain in their own courts, under the laws of their own country.

For several years a vigorous campaign has been carried on in Germany by divers persons to secure control and representation of claims on policies issued in Germany by American companies, for prosecution in the American courts, upon the representations that a much larger recovery might be had in the American courts than from German courts or German administrative bodies.

Mr. Buckner in his affidavit states that prior to the beginning of the World War four large American life insurance companies transacted business in Germany, viz., the Guardian Life (formerly Germania), the Mu-

tual Life, the Equitable Life, and appellee. He also states that there are outstanding about twenty-eight thousand policies issued in Germany by these companies, including appellee, to German citizens, payable in German marks, and subject to valorization under German law. He then continues (Trans. Rec. 465):

> "For several years last past there has been conducted, and is still being conducted in Germany, by attorneys and associations of present and/or former policyholders of said four insurance companies, a vigorous campaign to secure control and/or representation of said policies of insurance for the purpose of commencing proceedings before the courts of Oregon and other states, for the purpose of endeavoring to recover judgments upon those policies in American courts or to harass defendant and said other insurance companies sufficiently to secure a settlement of such claims. Pursuant to this campaign many policies of insurance issued by the defendant in Germany and payable in marks have been assigned to various persons for the purpose of bringing actions in the American courts, and particularly have many assignments been made to Paul Herrmann, a citizen and resident of Germany, who has already brought actions in the courts of Oregon as alleged assignee upon a large number of policies issued by the defendant in Germany to German citizens, and payable in German marks. I am informed and believe and therefore aver that under the terms upon which said claims are solicited for prosecution in American courts, and under the terms of said assign-

ments, it is provided that attorneys prosecuting such claims before American courts shall take and prosecute said suits and actions only upon a contingent fee basis. Said claims have been obtained for prosecution in American courts upon statements and representations that a much larger recovery can possibly be had in the American courts than from German courts or German administrative bodies."

Mr. Buckner also refers to the two cases brought in New York against appellee and which were dismissed upon motion supported by affidavits similar to those in the case at bar (Trans. Rec. 466).

Attached to the affidavit of A. E. Clark (Trans. Rec. 440) is the power of attorney under which these German litigations are being promoted and carried on.

The power of attorney runs to Transatlantic Estates & Credit Company, Inc., of New York City, Joseph Woerndle of New York City, C. T. Haas of Portland, and Paul Hermann of Heidelberg, Germany, or either of them. The corporation and individuals so designated are given plenary powers to compromise and settle any claims in any manner or for any amount they may determine, prosecute any suit at law or in equity, assign or make any other disposition of the claim, and it is provided that (Trans. Rec. 443):

"In consideration of the sum of One Dollar and/or its equivalent to me in hand paid, the receipt of which is hereby acknowledged, and of other good and valuable considerations and of

> the services performed and to be performed, and for and in consideration of money expended, and to be expended, in an endeavor to secure a refund on said above described policy, I hereby grant, sell, assign and transfer to Transatlantic Estates & Credit Company, Inc., of New York City, and/or Joseph Woerndle of New York, N. Y., or C. T. Haas of Portland, Oregon, and/or Paul Hermann of Heidelberg, Germany, its, his or their agent, in absolute ownership, an undivided twenty-five % or interest in and to all my right, title and interest in and to above described policy and in and to any right for refund," etc.

This action, and all of the other actions brought in Oregon upon German insurance policies, appear to be speculative enterprises in which the policyholder invests nothing. He is over in Germany, within the protection of the courts and laws of his own country, and, no doubt, feels certain that he can obtain all that German law will give him regardless of the action of the American courts. If the American courts should be persuaded to retain jurisdiction and give him more than he is entitled to under German law, so much the better for him and for his attorneys in fact who have entered into the speculation with him. If the American courts should deny him any relief, indeed, should even hold that he had no claim against the appellee, either under German or American law, his rights under German law would be in no wise impaired, because the German courts have held that, in view of the venue provisions in the insurance policies and the provisions of the valori-

zation laws setting up elaborate administrative machinery for the settlement of insurance policy contracts, no tribunals other than German are competent to take jurisdiction of or determine any controversy arising out of such insurance contracts.

The German Federal Insurance Department in its decision of February 12, 1930, a copy of which is attached to the affidavit of Mr. Buckner as Exhibit "A" (Trans. Rec. 479-491), took cognizance of the propaganda carried on by divers persons and associations throughout Germany to secure representation of German policy claims for prosecution in this country and referred to the "success honorary" which the promoters hoped to earn. It was in this decision that the German Insurance Department set down the terms of the agreement between the defendant, the German Insurance Department and the Trustee appointed under the German valorization laws to represent all policyholders, under which a large contribution was made by appellee to the valorization fund in accordance with the requirements of German law, for distribution ratably among policyholders. The German Insurance Board, in that decision, among other things, said (Trans. Rec. 491):

> "In any case, in the verbal negotiations, which took place between the Trustee, several members of the Insurance Department and the vice-president of the company, Mr. Buckner, a result was reached which must be termed acceptable and serviceable to the interests of the insured. It is true that it remains behind the high expectations

of the insured, who were pitched up by the active propaganda of the associations, which latter—this only a by-the-way remark—had conditioned for themselves quite a considerable 'success-honorary', but it anyhow reached and even exceeds the revaluation quota which these associations had originally declared sufficient. The quota assessed by the Senate corresponds with and in many instances even exceeds the revaluation rates of a number of the German companies. It burdens the 'New York', whose revaluation stock is exceedingly low in consequence of its having invested its premium reserves exclusively in bonds, with a considerable sacrifice. Besides, the contribution, which the 'New York' has in this manner to pay, exceeds, in respect to amount, by many million Reichsmark the amounts fixed so far for domestic and foreign insurance enterprises. In considering the proportion between the existing revaluation stock and the payment with which the company gets charged by the assessed contribution, one can but term the result a favorable one. The so far existing revaluation stock made a revaluation of at most only 1.8% of the goldmark reserve possible. By the contribution which the company has to pay the revaluation rate gets increased more than seven-fold.

"Although the free resolution of the Senate was not interfered with by the position taken by the American supervising authority, the declaration of the 'New York' could not remain unnoticed, that larger payments would not be compatible with the interest of the totality of its in-

sured and would not be tolerated by the American supervising authority.

There is another phase of this litigation to which we invite the attention of the court. Pending in the Circuit Court of the State of Oregon, for Multnomah County, is an action brought against appellee by one Luetjohann, a citizen and resident of Germany, on a German insurance policy. Substantially the same issues of law and fact that are involved in that case as are involved in the case at bar and in all of the other German insurance cases (Trans. Rec. 528). It appears from the Supplemental Affidavit of A. E. Clark, and the exhibits annexed, that a motion has been filed in that case requiring appellee to bring to Portland, and there submit to inspection by counsel for Luetjohann, who also represents all the plaintiffs in various actions brought on German policies:

> "All of the day books, journals and ledgers kept by defendant during the years 1922 to 1928, whether in book form or otherwise and
>
> "All balance sheets and trial balances;
>
> "Also all lists, registers and other records containing the names of all policyholders and the amounts and kinds of insurance issued and in effect during said years;
>
> "All other books, papers, documents and records in the possession of defendant which disclose the amount of profits made each of said years by defendant and which disclose the present whereabouts, amount and situs of the assets and surplus of the defendant and the investments thereof;

> "All books of account, papers, documents and records in the possession of the defendant which disclose the unit value, i. e., American dollars or other units, in which the profits, surpluses and assets of the defendant were earned by defendant and were kept during said years and are now kept and figured and calculated in said books of accounts." (Trans. Rec. 534.)

An affidavit was made by Mr. Haas in support of this motion, averring that all of the books, records, etc., requested were necessary to the preparation and prosecution of the case.

Mr. MacFarlane, vice-president and actuary of the appellee, filed an affidavit (Trans. Rec. 538) in opposition, in which, among other things, he stated that the books and records demanded by plaintiff in the case comprised hundreds of volumes of current books, that the company had outstanding during the period covered by the request more than two million, five hundred thousand policies, and that these records were in daily use by hundreds of accountants, actuaries and other employees of appellee, making loans, computing dividends, converting policies, answering inquiries, etc., and to comply with the request would disrupt all of the departments and practically stop the company's operations. He estimated it would take a great many fully loaded freight cars to carry the records in question.

Upon the undisputed facts disclosed by the affidavits supporting the motion to dismiss, it was within the sound discretion of the Trial Court to decline to retain jurisdiction and dismiss the action.

It seems to be the contention of counsel for appellant that in obedience to constitutional and statutory mandates the Federal Court must retain jurisdiction and proceed to judgment in every action if transitory in form tested alone by the allegations of the complaint brought by a non-resident alien against any citizen, natural or corporate, without regard to where the cause of action arose, the real nature of the action, where witnesses live or other evidence may be found, or what rights or remedies are given under the laws of the country where the cause of action arose.

There are involved in these actions important questions regarding the existence and interpretation of German laws and the decisions of German courts and administrative tribunals. These are not found in the libraries of Oregon. If they were they would not be understandable in their original form except by persons thoroughly familiar with the German language, particularly with German legal terminology, and deeply learned in the German law. Translations may be obtained with great labor and difficulty. Translators seldom agree. Agreements between legal experts as to the laws of a foreign country are still more infrequent. There are obvious difficulties in translating into the language of one country the laws and judicial decisions

of another, having a different language, system of jurisprudence and historical background.

It is our contention that the courts of Oregon, state and federal, have the power to and will protect themselves against a deluge of alien litigation upon causes of action between non-residents, arising in a foreign country. The courts of this country and of Great Britain have frequently used this discretionary power. The power which the court exercises in declining to retain jurisdiction of a cause, as a matter of discretion, is judicial. It has been said to be inherent. It has been suggested, although not directly decided, that it is a power which the legislature may not wholly take away.

A non-resident alien, so the reasoning runs in the decisions, has no absolute right to bring his cause of action arising elsewhere, into the federal or local courts of any state. The courts may permit him to do so as a matter of comity. Many considerations have influenced the courts in declining to retain jurisdiction. Among those most frequently mentioned by the courts are:

(a) That a given cause may be more conveniently tried and with less expense to litigants where it arose, the courts of that place being open, functioning and competent to try the cause;

(b) That without apparent reason or cause a citizen of another state or nation ignores and passes by his own courts, which are competent to adjudicate his rights, and

imports his cause to the courts of a distant state or country;

(c) That because of the distance from the place where the cause of action arose, the difficulties attending upon a judicial investigation, the fact that the court might be called upon to deal with foreign laws and contracts written in a foreign language, it would not be easy to dispense justice, or for the court to have any assurance that it is, in fact, enforcing the right of action given by the legis loci;

(d) That the courts of a state are primarily set up for the benefit and convenience of its own citizens, and those having business within its jurisdiction, and should not be put to the expense, and burdened with the trial, of controversies arising elsewhere and imported into the jurisdiction by non-residents;

(e) That an alien litigant comnig into our courts had contracted to submit the controversy to some designated foreign court; and

(f) That a court should not undertake to adjudicate rights originating in another country, under laws, statutory and otherwise, differing materially from the laws of the forum, and especially where these laws are written in a foreign language unfamiliar to the courts of the forum, and the rights and remedies given by foreign laws are such as the court of the forum may find it difficult, if not impossible, to administer.

Before taking up the discussion of the contentions made by counsel for appellant and a review of the federal decisions and those of various state courts, applying the doctrine of discretion to alien litigation, we wish to refer to two cases brought by German policyholders against the appellee in the courts of New York, its home state, and in which the New York courts declined to retain jurisdiction and entered judgments of dismissal upon a showing by affidavits of facts substantially like those before the court in the case at bar.

On November 27, 1925, Von Neissen-Stone brought an action in New York against appellee upon an insurance policy issued in Germany and payable in German marks. The insured died before the action was commenced. Plaintiff, the widow of the deceased, was beneficiary. A motion was made similar to the one now before this court. It was heard before Judge Koch, of the New York Supreme Court, who overruled it, expressing the view that he could only consider the complaint in determining whether or not jurisdiction should be retained, and that the matters set up by affidavit should be set up by answer. From this order an appeal was taken by appellee to the Appellate Division. While this appeal was pending and on December 1, 1925, another like case, entitled Higgins versus New York Life Insurance Company, was begun in New York. Higgins was a resident of New York and was assignee of a policy issued to one Peters, who was born a German subject but became a citizen of the United States before the pol-

icy was issued. However, the policy was issued in Germany, was there payable in German marks and was issued to Peters while he was residing in Germany as an employee of a German steamship company. A motion was made in the case similar to that made in the Von Neissen-Stone case. Judge Lyndon, of the New York Supreme Court, dismissed it with an opinion from which the following is quoted:

> "Upon all the allegations in the papers before me I think the court should refuse to take jurisdiction of the subject matter of this action. Motion to dismiss the complaint is granted."

Higgins appealed to the Appellate Division, and on May 28, 1927, the order dismissing his case was affirmed by the Appellate Division without opinion, all five members of the court concurring (220 App. Div. 760), 222 N. Y. S. 819. On June 30, 1927, the order in the Von Neissen-Stone case, denying the motion to dismiss, was reversed and the case dismissed without opinion on the authority of the Higgins case. These cases were not taken to the Court of Appeals.

It was after these cases were dismissed in New York, and on October 3, 1927, that the first of the German insurance cases was commenced in Oregon.

We have, and made available to the lower court, the printed records in the Higgins case and in the Von Nissen-Stone case, containing all the pleadings, affidavits, etc., and will make them available to this court if desired.

The Von Nissen-Stone and the Higgins cases are referred to in the affidavit of Mr. Buckner (Trans. Rec. 466) and in the opinion of Judge Bean (Trans. Rec. 564), 45 Fed. (2nd) 426. Substantially the same question came before Judge Tucker, of the Circuit Court of Multnomah County, Oregon, in the case of Kahn versus appellee on demurrer by Kahn to a plea in abatement filed by appellee, and he reached the same conclusion as that reached by Judge Bean. Concerning the opinion of Judge Tucker, Judge Bean said (Trans. Rec. 565):

> "Judge Tucker, in the State Court of Multnomah County, in an able and well-considered opinion in a case brought on one of the German policies (Kahn v. New York) reached the same conclusion."

Counsel for appellant suggest that because appellee removed this case from the state court it stands in a different situation than if the case had been originally brought in the federal court. The answer to this may be found in Section 81, Title 28, U. S. Code, which reads:

> "The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said state court prior to its removal."

Counsel for appellant assert that he has a constitutional right to have the court hear and determine his

cause, and this assertion is based upon Article 3, Section 2 of the Federal Constitution. It is not generally supposed that non-resident aliens have any personal constitutional rights. However that may be, in *Kline v. Burke Construction Co.,* 260 U. S. 226, 233, 67 L. Ed. 226, 231, the court held that the right of a litigant to maintain an action in a Federal court on the ground of diversity of citizenship (P. 231):

> "Is not one derived from the Constitution of the United States, unless in a very indirect sense. Certainly it is not a right granted by the Constitution. * * * Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."

Joined with the claim that appellant has a constitutional right to have his cause determined is the further claim that Section 41 of the Judicial Code inflexibly imposed upon the lower court the duty to hear and determine the cause and deprived it of any discretion in the matter.

Section 41, Title 28, U. S. Code, reads in part as follows:

> "The District Court shall have original jurisdiction as follows:
>
> "(1) First. Of all suits of a civil nature, at common law or in equity * * * between citizens of a state and foreign states, citizens and subjects.

"(2) * * *

"(3) Third. Of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy," etc.

It will be observed that the District Courts are given original jurisdiction of all civil causes of admiralty and maritime jurisdiction as fully and to the same extent as they are of other civil suits. The Federal Courts time without number have declined to retain jurisdiction of admiralty suits when in the discretion of the court it appeared to be inconvenient or inexpedient to retain jurisdiction. These provisions of the Judicial Code vest the District Courts with power to take jurisdiction of and try the various classes of cases enumerated. They do not interfere with or undertake to limit the discretionary power of the court to decline to retain jurisdiction of a cause, as, for instance, one brought by an non-resident alien on a cause of action arising in a foreign country when it appears that it would be inexpedient or inconvenient to do so, where the foreign laws are of doubtful meaning, and the rights and remedies of the parties may be difficult of ascertainment and beyond the powers of the court adequately to administer.

The opinion of the late Judge Bean, sustaining the motion to dismiss, is in the record (Trans. Rec. 560), 45 Fed. (2nd) 426. His remarkably clear, terse statement of the questions involved shows that he made a careful study of the whole record. He points out that it would no doubt consume many months' time of the court to try and dis-

pose of the German insurance cases then pending, disrupting the ordinary calendar and resulting in delay, inconvenience and expense to other litigants entitled to invoke the jurisdiction of the court. And, further said Judge Bean:

> "It is apparent that the plaintiffs are seeking by these actions to impose on the defendants a liability under a different rule than 'that under which the parties dealt'.
>
> "The courts of Germany have ruled that any person seeking to recover on a civil contract made in Germany prior to August, 1924, and payable in marks, can only recover on the basis provided in the monetary law of 1924. Manifestly the plaintiffs are not proceeding on any such theory."

Answering the contention of appellant that because the court had jurisdiction of the subject matter and the parties it had no discretion but must proceed with the cause, Judge Bean said (Tr. p. 563):

> "It is argued by the plaintiffs that because the court has jurisdiction of the subject matter and the parties, it has no discretion but should proceed with the case regardless of where the cause of action arose, or the law by which it is controlled, or the residence or convenience of the parties and witnesses, or the difficulty the court would encounter in attempting to interpret and enforce a foreign contract, or the interference with the other business of the court. But that is a matter resting in its discretion."

And after a review of the authorities he concludes (Tr. p. 565):

> "It is to me unthinkable that residents and citizens of Germany may import bodily into this court numerous actions against a non-resident defendant, on contracts made and payable in Germany, and insist as a matter of right that, because it has obtained jurisdiction of the defendant by service of its statutory agent the taxpayers, citizens and residents of the district having business in the court should stand aside and wait the conclusion of the case, where, as here, the courts of Germany and of the home state of the defendant are open and functioning."

Slater v. Mexican National Ry. Co., 194 U. S. 120, 48 L. Ed. 900, was an action at law brought in the Federal Court in Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico, to recover damages for the death of an employee of defendant, also a citizen of Texas, killed in Mexico in the course of his employment. Mexican law provided a remedy for death thus sustained. The court pointed out that the cause of action arose in Mexico, that the nature and extent of the recovery must be determined by the law of that country, that many difficulties would present themselves in an effort to determine the meaning of Mexican law and to apply it in a Federal Court; that the remedies were not such as were ordinarily within the competency of a Federal Court to administer. The action was ordered

dismissed. The court among other things said (pp. 126, 129):

> "The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations follows the person, and may be enforced wherever the person may be found. *Stout v. Wood,* 1 Blackf. 71; *Dennick v. Railroad Co.,* 103 U. S. 11, 18; 26 L. Ed. 439, 442.) But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, *Smith v. Condry,* 1 How. 28; 11 L. Ed. 305, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. * * *
>
> "The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assume that it did, for the purposes of this part of the case."

Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405, 409, 73 L. Ed. 762, 766, was an action brought in Mis-

sissippi by a Louisiana corporation against a Danish corporation having its principal American office in New York, and qualified for the transaction of business in Mississippi, upon a policy of insurance issued in South America where the loss occurred. The case was removed to the Federal Courts of Mississippi. It was contended that under the statutes of Mississippi the plaintiff had an absolute right to bring its action there. Among other things the court said in ordering a dismissal (P. 766):

> "The importation of such controversies would not serve any interest of Mississippi, * * * and, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the state the duty, or to give them the power, to take cases arising out of transactions so foreign to its interests."

In *In re Belgenland,* 114 U. S. 355, 29 L. Ed. 152, the Supreme Court distinctly recognized the power of a trial court to decline jurisdiction over a controversy between non-residents of the forum and not arising therein. It was there said (p. 163):

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The cases of foreign seamen suing for wages, or because of

ill treatment, are often in this category; and the consent of their consul, or minister, is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction; but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not."

Charter Shipping Co. v. Bowering, Jones & Tidy, 281 U. S. 515, 74 L. Ed. 1008, was a suit brought in New York arising out of a voyage of a ship from the Atlantic coast of the United States to London. The parties were English corporations doing business in this country. The District Judge in the exercise of his discretion dismissed the suit and remitted the parties to French courts. The Circuit Court of Appeals reversed the dismissal. The Supreme Court in turn reversed the Circuit Court of Appeals and reinstated the judgment of the District Court, holding that his discretion should not be reviewed unless abuse was shown. The Supreme Court pointed out that the case apparently involved the application of English law and that the American witnesses were not shown to be in or near the Southern District of New York, where the suit was brought and, in part, said (P. 577) :

"The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court. The exercise of its discretion may not be disturbed, unless abused. The Belgenland, 114 U. S. 355, 368, 29 L. Ed. 152, 157, 5 Sup. Ct. Rep, 860; The Maggie

Hammond, 9 Wall. 435, 457, 19 L. Ed. 772, 780. * * *

"Both the parties being British subjects, and the present litigation as well as the suit pending abroad, apparently involving the application of English law to the fund located there, it was for the District Court to say, as it did, upon a consideration of all the circumstances, whether it should decline 'to take cognizance of the case if justice would be done as well by remitting the parties to the home forum'. See The Maggie Hammond, supra (9 Wall. 457, 19 L. Ed. 780). * * *

"While some witnesses as to seaworthiness were 'American repair men', it does not appear that any were in or near the Southern District of New York.

"It was for the District Judge to consider the facts appearing and the inferences that he might draw from them, and reach his own conclusion as to the convenience of witnesses, as well as the other factors upon which he decided that justice would be best served by leaving the parties to their suit in England."

In *Missouri Pacific v. Clarendon Co.,* 257 U. S. 533, 66 L. Ed. 354, a suit by a railroad company of Missouri against a New York corporation on the breach of an Arkansas contract was refused admittance into the Louisiana courts. The late Chief Justice of the United States said (P. 535):

"Still less is it incumbent upon a state in furnishing such process to make the jurisdiction

over the foreign corporation wide enough to include the adjudication of transitory actions not arising in the state. Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the state upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the state. * * *

In *Cuba R. Co. v. Crosby,* 222 U. S. 473; 56 L. Ed. 294, Mr. Justice Holmes comments on the enforcement of foreign causes of action as follows (P. 479):

"We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. The right to recover stands upon that as its necessary foundation. It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold. * * *

"There was some suggestion below that there would be hardship in requiring the plaintiff to prove his case. But it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the

> place that established and would enforce their rights. A discretion is asserted in some cases even when the policy of our law is not opposed to the claim. The Maggie Hammond, 9 Wall. 435. The only just ground for complaint would be if their rights and liabilities, when enforced by our courts, should be measured by a different rule from that under which the parties dealt."

The Supreme Court has declared unconstitutional state statutes permitting suits by non-residents in a jurisjiction in which no element of the cause of action has its situs, although the railroad company defendant is suable there. In *Davis v. Farmers Co.,* 262 U. S. 312, 67 L. Ed. 996, it was said (P. 315):

> "That the claims against interstate carriers for personal injuries and for loss and damage of freight are numerous; that the amounts demanded are large; that in many cases carriers deem it imperative, or advisable, to leave the determination of their liability to the courts; that litigation in states and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation, and causes, directly and indirectly, heavy expense to the carriers; these are matters of common knowledge. Facts, of which we, also, take judicial notice, indicate that the burden upon interstate carriers imposed specifically by the statute here assailed is a heavy one; and that the resulting obstruction to commerce must be serious. During federal control absences of em-

> ployees incident to such litigation were found, by the Director General, to interfere so much with the physical operation of the railroads, that he issued General Order No. 18 (and 18-A) which required suit to be brought in the county or district where the cause of action arose or where the plaintiff resided at the time it accrued. That order was held reasonable and valid in *Alabama v. Vicksburg Ry. Co. v. Journey,* 257 U. S. 111. The facts recited in the order, to justify its issue, are of general application, in time of peace as well as of war."

Goldman v. Furness & Co. (D. C. N. Y. 1900), 101 Fed. 467, was a suit on a contract made in Canada between a German and an English corporation doing business in Canada and New York. First, the German brought the suit in the Federal Court in New York and upon motion of the defendant, the court remitted the parties to Canada by dismissing the action. The German thereupon assigned the cause of action to a resident of New York, who immediately brought the present suit in the Federal Court in New York. Upon motion to dismiss, the Court (Brown, J.) again considered the point and in dismissing the second suit, said (P. 467):

> "Upon a former libel filed February 15, 1900, by Sally Wertheim, as libelant, against the present defendant, upon a special appearance of the defendant and affiravits showing that both parties were non-residents; that the contract was in fact made between the agents of the parties in person in Montreal; that no part of the contract

was to be executed within the United States; that it had been partly performed; that it was governed by the law of Canada, and that nearly, if not quite all, of the witnesses were there, and that the convenience of the parties would be greatly subserved by the trial of the cause in Canada, rather than within this jurisdiction, it was held that the Court should not exercise its discretionary power to enforce a trial of the cause here, but should remit the parties to the more appropriate forum of Canada. * * *

"It is impossible to suppose that the assignment alleged is anything else than a colorable assignment, made for no other purpose than to present an American citizen as libelant, and thereby remove one of the grounds upon which the former libel was dismissed. Aside from this circumstance, all the substantial reasons for prosecuting the suit in Canada rather than in this jurisdiction, remain as before; and if the court was not required to take jurisdiction of the former libel, and if Canada was the proper forum for the trial of the cause, it would seem manifest that an assignment that can only be deemed colorable should make no difference. * * *

"Every circumstance opposes the trial of the cause within this jurisdiction and makes that of Canada more appropriate, except apparently the choice of the German company and its agent, the present libelant. This court is overburdened with causes which must be tried within this jurisdiction; and it ought not voluntarily to entertain jurisdiction of other causes which on all grounds are more appropriately triable elsewhere, to the

neglect and prejudice of its own proper and necessary business."

In *Atchison Ry. Co. v. Weeks,* 254 Fed. 513, the Circuit Court of Appeals for the Fifth Circuit discussing the public policy against subjecting a large, widespread institution to suits far away from the place where the causes arose, said (P. 518):

"When the law is so doubtful in its terms or its application, there can be no impropriety in considering in its development the public policy involved. As applicable to railroad corporations, the recognition of a right to sue for damages for injuries in any place other than in the state of the injury is of very questionable policy. While the rule may be justified as to an individual on account of the ease with which the right to recover might otherwise be defeated, no such reason exists as to a railroad, whose residence and business are permanently localized. Manifestly, there are many advantages in trying such a case where the cause of action arises. The law of the cause of action is the law of the place. It may be assumed that the courts of the state can more satisfactorily administer the laws of the state than can the courts of any other state. The expense incident to a trial would usually be materially less at the place of the tort than elsewhere. The imposition upon a state of the expense of maintaining courts to try causes in which the state has no interest would be difficult to justify. The maintenance of the judicial machinery involves no light burden. Many of the states, including

Texas, have been unable to provide adequate machinery. No good reason could probably be made to appear why her overworked courts should be compelled to carry any part of the burdens of other states."

In the case of the 194 Shawls, (D. C. N. Y. 1848) F. C. 10521 (18 Fed. Case 703), Judge Betts anticipates the present rule on the subject in the following language (P. 705):

"I find no authority of weight which imposes on the courts of our country the necessity of determining controversies of foreigners resident abroad, either in common-law actions, transitory in their nature, or maritime proceedings when the remedy is in rem.

"If the doctrine were peremptory, imparting to suitors the right to such aid, and imposing on courts the obligation to afford it, actions for supplies and materials, on charter-parties and bills of lading, or by mechanics for labor, would be comprehended within the class, equally with suits for wages, on bottomry bonds or for salvage compensation. * * *

"Should it transpire, in the progress of the litigation, that the law of the domicile of the parties must be ascertained in order to adjudge rightly on their claims, or that witnesses must be examined there to fix the facts in the controversy, the court might be compelled to suspend its movement and wait until these cardinal particulars could be supplied from abroad. Every tribunal experiences the inconvenience and unsat-

> isfactoriness of so settling controversies between those even who can have no other means of redress, and will recognize the value of the principle which enables them, in regard to foreigners, to remit their controversies to their home tribunals, where the law is known, and the facts can be more surely determined.

In *Watts, et al. v. Unions, etc.,* 224 Fed. 188, 191, in declining to retain a suit brought by a British company upon a cause of action arising abroad, said (P. 191):

> "But when parties foreign to a state come before its courts, asking cognizance of obligations which arose and were to be performed outside that state, the exercise of its jurisdiction is not obligatory; it is discretionary with a view to the circumstances. *The Belgenland,* 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Benedict's Admiralty, Section 195.
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> "If jurisdiction is exercised, it is exercised as an act of international comity; if refused, the refusal does not arise out of any incapacity to act. Comity, therefore, is not a rule of law, but a rule of practice, convenience and expediency."

State courts seldom, if ever, have construed statutes vesting and defining jurisdiction as abrogating the doctrine of "forum non conveniens" or as forbidding a court in the exercise of a discretion, said by some courts to be inherent, to decline to retain jurisdiction and remit the litigants to the forum of their domocile and the origin of the cause.

The following cases are illustrative:

In *Robinson v. Ocean Steam Navigation Co.,* 19 N. E. 625, 112 N. Y. 315, 323, 2 L. R. A. 636, the court had before it the question of the right of a non-resident to sue in the state in the exercise of one of the privileges granted to him by the Federal Constitution. It was held that the non-resident had no such right. Among other things, the court said (P. 323):

> "The discrimination between a resident and non-resident plaintiff is based upon reasons of public policy, that our courts should not be vexed with litigations between non-resident parties over causes of action which arose outside of our territorial limits. Every rule of comity and of natural justice, and of convenience, is satisfied by giving redress in our courts to non-resident litigants when the cause of action arose or the subject matter of the litigation is situated within this state."

In *Pietraroia v. N. Y. & H. R. R. Co.,* 116 N. Y. Supp. 249, 250; 133 App. Div. 829, the court had before it an Act of the New York Legislature passed in 1913 declaring that certain classes of actions might be brought in New York and that certain classes of suitors might bring actions in New York. The cause of action arose in New Jersey, where the decedent had resided and where all of the beneficiaries of her estate resided. The defendant was a New Jersey corporation authorized to transact business in New Work, where service might be made upon it and thus technically was within the

statute. The plaintiff, a resident of New York, had been appointed an administrator in New York, and was within one of the classes of suitors enumerated in the statute. On motion the court dismissed the action, among other things saying (P. 250):

> "No resident of this state had the slightest interest in the controversy and certainly there is objection to the courts of this state concerning themselves with controversies between non-residents. * * * If, technically speaking, the Supreme Court of this state had jurisdiction of the action, the plaintiff being a resident, the courts are not bound to exercise the jurisdiction when those solely benefited are non-residents and when no reason exists why the liability cannot be enforced in the state where the parties reside and where the cause arose."

On appeal to the Court of Appeals (197 N. Y. 434; 91 N. E. 120), the dismissal was affirmed. That court held that the statutes would not be construed as requiring the court to retain jurisdiction, or as interfering with the inherent power of the court, in the exercise of its discretion, to dismiss the case where it appeared that the real controversy was in fact between non-residents upon a cause of action arising outside of New York.

Waisikoski v. P. & R. Coal & Iron Co., 159 N. Y. Supp. 906, 178 App. Div. 578, was an action brought in New York on a cause of action arising in Pennsylvania by residents of the latter state against a Pennsylvania corporation doing business in New York. Service upon

the defendant in New York was authorized by the statute, and it was the contention of plaintiff that the New York courts were bound to try the case because plaintiff had made proper service upon the defendant in New York. The court suggested doubt as to the power of the Legislature to take away from the court the power in its discretion to decline jurisdiction where the cause of action arose in another jurisdiction where the courts were open and functoning, the applicable laws familiar to those courts and where the witnesses resided, and where it appeared for those and other reasons that it might be difficult for the court to do as full and accurate justice as might be obtained where the cause of action arose. It was held that the statute would not be given such construction. The action was dismissed and the dismissal affirmed by the Court of Appeals (228 N. Y. 589, 127 N. E. 923).

See also:

Collard v. Beach, 81 N. Y. Supp. 619, 81 App. Div. 582.

Bagdon v. P. & R. Coal & Iron Co., 165 N. Y. Supp. 910.

Smith v. Mutual Life Insurance Company, 96 Mass. 336 (14 Allen), was a suit brought in Massachusettts by one non-resident against another, both, however, citizens of the United States. The subject matter of the suit was within the general jurisdiction of the court and the defendant was properly served with process in Massa-

chusetts. The court, in the exercise of its discretion, declined to retain jurisdiction, saying (P. 343):

> "But aside from the question of power, depending on the right of jurisdiction, we regard it as within the province of the court, sitting as a court of equity, in its discretion, to decline to exercise jurisdiction in such case; referring parties to the tribunals of the state upon whose laws these relations and rights peculiarly depend, and where alone they can be effectually and properly administered."

National Telephone Mfg. Co. v. Dubois, 165 Mass. 117, 42 N. E. 510, 30 L. R. A. 628, was a suit by a resident of New Hampshire against a Pennsylvania corporation which had an office and place of business in Boston and where proper service of process upon it was made. The court pointed out that the cause of action arose in Pennsylvania; that the books, papers, records and witnesses of the defendant relating to the matter were in Pennsylvania; that the defendant would be subjected to great and unnecessary expense and inconvenience if the trial were had in Massachusetts; that the inquiry could be carried on with less expense and difficulty if suit was brought in Pennsylvania; and in the exercise of judicial discretion the court dismissed the suit and remitted the plaintiff to the courts of the state where the cause of action arose.

Mexican National R. R. Co. v. Jackson, 89 Texas, 107, 31 L. R. A. 276, was an action brought in the Texas courts on a cause of action in favor of a Texas citizen,

which, however, arose in the course of his employment in Mexico. The Mexican laws upon which the right of action was based were similar to those considered by the Supreme Court of the United States in the Slater case, supra. The court said that the law of Mexico must be applied in determining the rights of the parties, that the action was transitory and ordinarily might be maintained in any place where the defendant could be found, providing there was no reason why the court whose jurisdiction was invoked should not entertain the action, and remarked (P. 113):

> "The plaintiff, however, has no legal right to have his redress in our courts, nor is it specially a question of comity between this state and the government of Mexico, but one for the courts of this state to decide, as to whether or not the law by which the right claimed must be determined is such that we can properly and intelligently administer it, with due regard to the rights of the parties. * * * The decisions of this court, well sustained by high authority, establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country under statutes materially different from the law of this state in relation to the same subject.
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> * * * * * *
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> "Many difficulties would present themselves, in an attempt to determine the meaning of the Mexican law, and to apply it in giving redress to the parties claiming rights under it. We understand the Mexican courts are not governed by

pracedent, and we have no access to reports of the adjudicated cases of those courts, from which we could ascertain their interpretation of these laws. The language of some of the articles quoted is ambiguous, and we find great difficulty in determining what would be a proper interpretation of the law. We might or might not give the same effect to the language that is given to it in the courts of Mexico. There could be no reasonable certainty that the parties' rights would be adjusted here as they would be if the case were tried in the courts of that country, which is their right; for it is well settled that, if one state undertakes to enforce a law of another state, the interpretation of that law as fixed by the courts of the other state is to be followed. This difficulty of itself furnishes sufficient reason for the courts of this state to decline to assume jurisdiction of this class of cases."

The court then said that if they assumed jurisdiction of controversies of this chacacter —

"We will offer an invitation to all such persons who might prefer to resort to tribunals in which the rules of procedure are more certainly fixed, and a trial by jury secured, to seek the courts of this state to enforce their claim. Thus we would add to the already over-burdened condition of our dockets in all the courts, and thereby make the settlement of rights originating outside the state, under the laws of a different government, a charge upon our own people."

Western Union Tel. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708, was an action to recover damages for failure to deliver a telegram. No question of jurisdiction over the defendant was raised in the lower court and no motion was made to dismiss the case in the exercise of discretion upon the ground that the parties were non-residents, and the question was not raised in any way in the lower court. For this reason the Appellate Court declined to consider whether, in the exercise of discretion, the lower court should have dismissed the case. However, in discussing the case the court made these observations (P. 85):

> "There may be some question of the propriety of our courts allowing themselves to be made the dumping grounds for litigants of other states, where the parties and witnesses reside there, the cause of action arose there, the contract was to have been performed there, and the courts of that state are open to them; and in such cases there can be no reasonable ground for seeking this jurisdiction except in order to get the advantage of some more favorable ruling than the decisions of their own state afford them."

Great Western R. R. Co. v. Miller, 19 Mich. 305, was an action brought by a Canadian citizen against a Canadian corporation doing business in Michigan. The defendant made voluntary appearance and moved the court, in the exercise of its discretion, not to retain jurisdiction but to dismiss the case. The Trial Court directed the dismissal of the case. After pointing out

that the case was within the general jurisdiction of the court, so that it was not a question of the power to proceed but a question of whether or not it was just and experient to proceed, the Supreme Court said (P. 314):

> "But where parties are not residents of the United States and the trespass was committed abroad, the right of action in our courts can only be claimed as a matter of comity, they are not compellable to proceed in such case. It is not to be denied that much hardship is likely to arise where a person is called upon to defend himself against a charge arising out of transactions at a distance and out of the jurisdiction. Witnesses cannot always be compelled or induced to be present at the trial. * * * Questions of foreign law may, as in this case, become important elements of decision. We think that when, by the pleadings or upon the trial, it appears that our tribunals are resorted to for the purpose of adjudicating personal torts committed abroad between persons who are residents where the tort was committed, the inconvenience and danger of injustice attending the investigation of such controversies, render it proper to decline proceeding further."

Disconto Gesellschaft v. Terlinden, et al., 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045 (affirmed by the U. S. Sup. Ct. 208 U. S. 570, 52 L. Ed. 625), was an action brought in the courts of Wisconsin by a banking corporation of Germany against Terlinden, a German subject, who had absconded from Germany and was served with process in Milwaukee. The plaintiff

after bringing the action attached certain funds in Milwaukee banks, there deposited by Terlinden.

The court pointed out that an action by a non-resident alien upon a cause of action arising in a foreign country is entertained or not in the courts of this country as the principles of comity may dictate; that jurisdiction may be assumed or declined at the discretion of the court; that the court should decline to take jurisdiction when public policy, convenience or the protection of the interests of the citizens of the state would seem to require that course; that it is not a question of the existence of the power to take jurisdiction, but a question of discretion in its exercise. The court referred to the volume of judicial business in the courts of Wisconsin, the crowded condition of the court docket, and then said:

> "The laws of the state are enacted primarily for the regulation, benefit and protection of persons, rights and property within its jurisdiction. To hold that two foreigners may import, bodily, a cause of action, and insist it is a matter of right, that taxpayers, citizens and residents shall await the lagging steps of justice in the ante room, while the court hears and decides the foreign controversy, seems, on the face of it, to be unreasonable if not absurd."

In *Stewart v. Lichtenberg,* 148 La., 195, 86 So. 734, the court said (P. 200):

> "However, under the rule of comity, between the several states, the courts of the one may, in

> their discretion, entertain jurisdiction over controversies, where personal citation is had within their territorial limits, between the citizens of other states, when it is within their power to do full and complete justice between the parties. But this power arises from no duty or inherent right in the litigants, and solely under the rule of comity referred to. Hence, when it appears that they may not be capable of doing full and exact justice between the parties because of a want of knowledge of the laws of another state, or where the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and the investigation will be surrounded with great difficulties, which can be avoided by suing at the defendant's domicile, courts may, and generally do, decline jurisdiction. R. C. L. vol. 7, pp. 1035, 1036; notes to 70 L. R. A. 513. See also, note to *Logan v. Bank of Scotland,* 3 Ann. Cas. 1153."

The rule announced and so frequently applied by the American courts is in harmony with the uniform practice of the highest British courts.

In *Societe du Gaz v. Les Armateur Francais* (1926), Sess. Cas. (H. C.) 13, a French cargo owner, on behalf of English underwriters sued a French steamship owner for a lost cargo, under a charter party in the English language in a form approved by the English Chamber of Shipping. The suit was in Scotland and there came to the House of Lords the question whether the lower

court rightfully remitted the plaintiff to the French courts.

The facts and the reasons which actuated the highest British court in upholding the refusal to retain jurisdiction appear from the following quotations:

From the Lord Chancellor (Cave):

"Now what are the relevant facts in this case? The pursuers and defenders are French companies carrying on their business in France. Neither of them has any place of business in Scotland. the ship in question was a French vessel built in France, and carrying a cargo for delivery to the pursuers in France under a charter-party of which none of the obligations fell to be performed in Scotland. The surviving members of the crew, and the crew of another vessel which for a time sailed with the ship which was lost, are French. The instructions to the master, and the log books, are in the French language, and the plans of the vessel are on the metric system with French notes. The vessel was of a special type known in France as the 'Marie Louise' class, upon which, as it appears from the pleadings of both sides, a Commission of the French Senate has reported, and has made certain recommendations with a view to safety. Lastly, it is said that the law of France permits the defenders under certain circumstances to limit their liability by abandoning the ship and freight and that they would be deprived of the opportunity of claiming this right if the suit were tried in Scotland.

"Against this series of facts, pointing to a

French Court as the appropriate tribunal for the trial of the issues, there are two facts which are said to operate in the other direction. First, the charter-party is in the English language and in a form approved by the English Chamber of Shipping; and, secondly, some witnesses who saw the vessel loaded are resident in Northumberland. But the form of the charter-party appears to be in common use by foreign owners; and clause 30 of the charter-party, which provides for arbitration only as to disputes arising at a port in the United Kingdom, gives rise to the inference that the parties contemplated that other disputes should be determined in the French Court. As to the English witnesses, their evidence could no doubt be taken in France, and in any case the existence of English witnesses is not a strong argument in favour of a trial in Scotland. From the beginning to the end of the case there is not a breath of Scotish atmosphere.

"I will only refer to one other circumstance. It appears to be the case that the real pursuers, that is to say, the persons who are behind the pursuers upon the record, are a firm of underwriters carrying on their business in England; but it does not appear to me that this is a circumstance which ought to affect the decision. The underwriters can only stand in the shoes of those to whose rights they are subrogated, and whose name they use; and your Lordships would, I think, treat the nominal pursuers as the actual pursuers for the purposes of this application. Further, the underwriters carry on their business in England and not in Scotland.

"In view of these facts I find myself unable to differ from the decision of the Court of Sessions that the Sheriff Court in Dumbarton is not an appropriate Court for the hearing of this suit, and indeed I find it difficult to conceive of a stronger case for the application of the doctrine of forum non conveniens."

* * * * * *

Lord Shaw:

"If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a forum which is not the natural or proper forum, either on the ground of convenience of trial or of the residence or domicile of parties, or of its being either the locus contractus, or the locus solutionis, then the doctrine of forum non conveniens is properly applied.

"In the present case the matter was brought to a point when I asked Mr. MacMillan: Was there one Scottish fact in the present case? and he answered that, except the bringing of this action, there was not one. Everything to be proved was outside of Scotland; parties were outside of Scotland; contract was outside of Scotland; the circumstances to be proved were, one set in France, and the other in England.

"In those circumstances it seems to me to be a violation of all propriety not to sustain the plea, as has been done."

Logan v. Bank of England, 1 K. B. 141 (1906), 3 Ann. Cas. 1148, is a decision by the English Court of Appeals affirming the dismissal of a case arising in

Scotland brought in London by a resident of Scotland against the defendant, a Scottish bonding corporation, with a branch in London. The opinion of the court contains so clear a statement of the doctrine for which we contend that we quote from it at length:

> "The action is purely a Scottish action, and all the transactions which give rise to the alleged cause of action took place exclusively in Scotland; all the parties to the action reside in Scotland, with the exception of the defendant Scott, who appears to reside in London.
>
> "The plaintiff is a schoolmaster, who resides at Inverary, in Argyllshire, and is a domiciled Scotsman. The bank is a Scottish corporation incorporated under an Act of Parliament in Scotland in the year 1695, and they have their head office in Edinburgh and numerous branches at various places in Scotland. The only branch of the bank outside of Scotland is in London, and the writ of summons in this action was served on the bank there. But the London branch appears to have taken no part and was not concerned in any way of the matters in question in this action.
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> "It is clear from the affidavits in this case that all the circumstances upon which the plaintiff relies in the statement of claim took place in Scotland and not elsewhere, and that all the evidence with reference thereto will have to be obtained from Scotland.
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> "If this action be fought out, it is obvious that it will involve calling a large number of witnesses, all of whom reside in Scotland, and none in England, and the production of numerous

books, documents, and papers relating to the matters in question in Scotland, about the production of which there might be considerable difficulty having regard to what is stated in the affidavit of Sir George Anderson, and also probably a consideration of Scottish law as affecting the rights and liabilities of the respective parties, and it is perfectly clear that a case of this kind ought, if possible, to be tried in Scotland, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England will be so great as to put a great oppression upon them if they were obliged to produce and keep their witnesses and documents, etc., in London during the time such a trial as that which would take place would last. In fact, the inconvenience would be so great and the expenses so heavy as to be utterly out of proportion to the insignificant sum involved in this action.

"The defendants made this motion practically upon the grounds stated in Sir George Anderson's affidavit, where he urges that no legitimate advantage can accrue to the plaintiff from prosecuting this action in England while there is an appropriate tribunal in Scotland, and that he believes that the plaintiff has not brought the action in England bona fide for the purpose of obtaining justice, but vexatiously and solely for the purpose of harassing the defendant bank under cover of asking justice, and in the hope that the bank, rather than incur the trouble and expense of trying the action in England, may be induced to pay something in order to get rid of an unfounded claim.

"The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the courts can properly exercise jurisdiction, but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court.

"Now, it is true that the Courts of this country have not gone so far as to express themselves upon the question of convenience in terms similar to those used in the Scotch cases, though, as I have already noticed, it may be doubted whether there is any substantial difference between the two. Yet it seems to me clear that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were

merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are. If, for instance, as was put in argument, a dispute of a complicated character had arisen between two foreigners in a foreign country, and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days' visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and staying it. Suppose, again, for instance, that this action had been brought against all the present defendants except Scott, and the bank had been served in this country, which it could be, as it has been in the present case, because it has a branch here, could there be any reasonable doubt but that the plaintiff must be treated as intending to bring a vexatious action and that such action would be stayed? If that were not held, I see no reason why any one abroad might not sue and

be allowed to proceed, against a bank which had a branch in this country, in respect of transactions all of which had taken place in some other country where the head office of the bank was — e. g., Australia or Brazil — and where the inconvenience of trying the case in this country would be so enormous as practically to work the most serious injustice against the defendant. This matter is, in this respect, of general importance, because so many banks and other mercantile houses which are established in our Colonies have branches here. To a business concern to allow actions to proceed in such circumstances when there is a proper and adequate tribunal in the place where both parties really are, and dealt with each other, and all the evidence, would be intolerable. In the present case, apart from this question about Scott, it is difficult to conceive anything more harassing to the defendant bank than to have their officials dragged up to London for a lengthy trial, when the Court of Session is, so to speak, across the way in Edinburgh, and when together with their officials they would have to bring up here, and keep away from their business, numerous other witnesses with a mass of books, papers, and documents, if they can get them at all, which there seemed to be some difficulty about without orders from the Court of Sessions as to some of them. All this to my mind is not measured by mere expense, and even on the question of expense it is to be pointed out that the cost of trying a case such as that indicated by the statement of claim, which refers to very complicated matters and attacks the character of

the bank and Sir George Anderson, is utterly out of proportion to the trumpery amount in dispute; and if the defendants win, one would gather that they would have little prospect of recovering their costs from the plaintiff.

"For these reasons, I think that this appeal should be allowed with costs here and below, the master's order restored subject to a slight correction, and the plaintiff left to pursue his remedies against the bank and Sir George Anderson on the other side of the Tweed amid his own countrymen. This involves no hardship upon the plaintiff, but is really to his advantage if his claim is persisted in and fought out; for he can make it at less expense and trouble to himself in Scotland than in England."

Cases Cited by Counsel for Appellant Discussed

On pages 13, 14 and 15 of Appellant's Brief a number of cases are cited to the proposition that, by removal to the Federal Court, appellee waived the objection that the suit was not brought in the district of its residence. No such question was raised by the motion, or in the lower court, and it is not raised here.

The cases which we will now briefly review are those cited by counsel for appellant in support of their contention that it was the imperative duty of the trial

court, without regard to the facts appearing in the record, to try the case and proceed to judgment.

It may be conceded that if a litigant, having a justiciable cause, resorts to the proper court, he is entitled to be heard. The cases cited in appellant's brief, read in the light of the facts in each case, go no farther.

In *Cohen v. Virginia,* 19 U. S. (6 Wheat.), 264, 403, the only question decided was that the Supreme Court had jurisdiction, under the Judicial Code of 1789, to review a judgment or decree of the highest court of a state in a case where the validity of a treaty or statute of the United States was drawn into question and the decision was against the validity thereof.

Wilcox v. Consolidated Gas Co., 212 U. S. 19, was brought in the Federal Court of New York by a New York corporation against New York officials to enjoin enforcement of laws fixing gas rates alleged to be confiscatory and violative of the Federal Constitution. The trial court enjoined the enforcement. The Supreme Court reversed the decree and dismissed the suit.

Second Employers Liability Cases (Mondou v. N. Y. N. H. & H. Ry. Co.), 223 U. S. 158, 56 L. Ed. 327, was brought in the state court to recover under the Federal Employers' Liability Act. The state court sustained a demurrer to the complaint. Among the questions considered by the Supreme Court of the United States was whether rights arising under the Employers' Liability Act might be enforced by suit in the courts of

the states when their jurisdiction as fixed by local laws was adequate for the purpose, and answered this question in the affirmative.

However, in *Douglas v. New York, New Haven & Hartford R. R.,* 279 U. S. 377, 73 L. Ed. 747 (not cited in appellant's brief), an action brought in a New York court under the Federal Employers Liability Act for injuries sustained in Connecticut by a resident of that state against a corporation doing business in New York, the Supreme Court held that the New York court was within its rights in declining in the exercise of its discretion to retain jurisdiction, and that:

> "There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned."

Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226, was an action brought by the Construction Company, a Missouri corporation, in the Federal Court of Arkansas against Kline and others, citizens of Arkansas, for breach of a contract to pave certain streets in a city in Arkansas. There existed the jurisdictional amount in controversy and diversity of citizenship.

Kline and his co-defendants then brought a suit in equity in one of the state courts of Arkansas, against the Construction Company, joining as defendants the sureties upon the performance bond, who were citizens

of Arkansas. The Supreme Court held, inasmuch as each case was a proceeding in personam it was not proper for the Federal Court to enjoin the case in the state court, and that each court might proceed in the exercise of its ordinary powers.

Raich v. Truax, 219 Fed. 273, affirmed 239 U. S. 33, was a suit brought by a subject of Austria residing and employed in Arizona, to restrain the Attorney-General and other officers of Arizona from enforcing a law of that state alleged to be violative of certain rights of the plaintiff guaranteed by the Federal Constitution. Obviously the plaintiff had a right to resort to the Federal Court to have his alleged constitutional rights determined, and inasmuch as the case was essentially local in character, the only Federal Court in which he could bring his suit was the Federal Court sitting in Arizona.

Southern California Tel. Co. v. Hopkins, 13 Fed. (2d), 814, 820, was a suit brought by a California corporation against certain public officials of Los Angeles County to enjoin seizure and sale of a large number of telephone talking sets in satisfaction of a local tax alleged to be violative of both the state and Federal Constitutions. The District Judge held that it could not be maintained until after the telephone company had exhausted its supposed remedies under the state laws. This court held that it could.

Norris v. Illinois Central, 18 Fed. (2d), 584, was brought in the Federal District Court of Minnesota under

the Federal Employers' Liability Act. This act provides that the plaintiff may bring an action in any district where the carrier does business. The railroad company operated a railroad line through Minnesota. A motion was made to set aside the service of process upon the ground that the action was not brought in the proper district. The Court overruled the motion, holding that where an action was brought under the Employers' Liability Act in a district in which the carrier was transacting business, service of process might be properly made there.

Re Thirty-fourth Street Railroad Co., 102 N. Y. 343, 353, 7 N. E. 172, 177, was a proceeding under the New York Act of May 6, 1884, to determine whether a proposed street railroad should be constructed. The act among other things provided that on application the court should appoint commissioners to determine whether or not the proposed railroad should be constructed. It was held, construing the language of the Constitution and of the legislative act, that it was the duty of the court, when proper application was made, to appoint commissioners.

Crane, etc., v. R. R. Co., 225 N. Y. Supp. 775, 131 Misc. 71, is a decision by one of the judges of the New York City Court. The plaintiff was a Massachusetts corporation, the defendant a Connecticut corporation, with an office in New York. Where the cause of action arose does not appear. There was no suggestion by motion or otherwise before trial that the court did not have

or should not take jurisdiction. Apparently some question was raised on the trial as to the jurisdiction of the court and the court held that it might proceed to judgment.

State v. Grimm, 239 Mo. 135, 143 S. W. 483, was an action upon an insurance policy issued to a citizen of Illinois by an insurance company organized in California and transacting business in Missouri. A motion was made to quash the service of summons upon the ground that the statutes of Missouri, properly construed, did not authorize service to be made upon a non-resident insurance company in an action upon a policy issued outside of Missouri. The motion was denied. That was the only question before the court.

Kimball v. Neal, 44 Vt. 567, involved the question whether action for possession of land should be brought in a law court or in equity.

In *Hagerstown B. Co. v. Gates,* 117 Md. 348, 83 Atl. 570, it was contended that the laws of Maryland, properly construed, did not authorize process to be served in an action by a non-resident on a contract made in another state. The court held that process might be served and jurisdiction of the person of defendant obtained.

In *Langnes v. Green,* 75 L. Ed. 379, No. 9 Adv. Sh. Oct. 1930, Term, the question was whether a ship owner against whom an action was brought in the state court to recover damages for injury sustained by a sailor had the

right to petition for limitation of liability in the Federal Court and enjoin the action in the state court, it appearing that there was but one claimant. The Supreme Court held that under the circumstances disclosed by the record it was improper to enjoin the prosecution of the action in the state court.

On page 16 of appellant's brief mention is made of the case of *State, ex rel Kahn, v. Tazwell,* 125 Ore. 528. That was the first of the German insurance cases brought in Oregon. The defendant moved to quash the service upon the ground that the statutes of Oregon properly construed did not authorize service to be made on a foreign insurance company transacting business in Oregon, based on a policy not issued in Oregon. The court overruled this contention. That was the only question properly before the court.

People, ex rel Beha, Supt. of Insurance of N. Y. v. Russian Re-Insurance, et al., 175 N. E. 115, No. 2 Adv. Sheets April 8, 1931, referred to on page 21 of appellant's brief as the Dougherty case, arose in connection with proceedings by the Superintendent of Insurance of New York to liquidate the assets in this country of two Russian insurance companies which for many years before the World War had operated branches in the State of New York and elsewhere in this country. In August, 1925, the Superintendent took possession of the assets of the New York branches in accordance with the New York insurance law, for the purpose of conserving them for the benefit of those entitled thereto, in view of the

hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic, and not because the insolvency of either of the companies was present or imminent. By various decrees of the New York courts the liquidator was protected in the possession and liquidation of the assets and the creditors restrained from pursuing any legal remedies until the domestic creditors and policyholders had been paid in full, as well as all foreign creditors who had acquired liens by attachment before liquidation was begun. After these claims had been paid the Superintendent held a surplus of about one million dollars for one company, and upwards of a million for the other, and the question was what disposition he should make of these funds. If there is anything in this pertinent to the case at bar it is certainly contrary to the contentions of appellant here. Creditors and policyholders with claims arising out of foreign business insisted that their claims should be paid by the liquidator, and if not, that they should be permitted to prosecute their claims in the courts by ordinary legal proceedings. The insurance companies insisted that they were entitled to the surplus funds and to deal with the claims arising out of foreign business. The Superintendent of Insurance took the position that he should be permitted to hold the surplus intact until some government recognized by this country should function in Russia. The court held that the authorities in New York had performed their full duty when they had paid the domestic creditors and others acquiring liens by attachments before the liquidator took

charge, that it was no part of their duty to hold the surplus or deal with the claims arising out of foreign business, that the Russian companies were competent custodians of the surplus funds, and the liquidator was directed to turn them over to these companies.

Finally, *Denver E. T. Co. v. Roller,* 100 Fed. 738, a decision by this court, is said by counsel for appellant to be in point. Mrs. Roller was injured in Colorado while a passenger on the train of plaintiff in error. The latter was a Colorado corporation. It had no railroad line in California, but had offices and agents there. It does not appear where the defendants in error resided, but it may be fairly assumed that they were residents of California. The action was brought in the state court and removed to the Federal Court, where a motion was made to quash the summons. The only question involved upon the motion was whether service was authorized by the laws of the State of California, and it was held that it was.

EACH POLICY, AS REQUIRED BY GERMAN LAW, SPECIFIED CERTAIN GERMAN COURTS AS HAVING EXCLUSIVE JURISDICTION OVER DISPUTES ARISING THEREON. THESE VENUE STIPULATIONS WERE VALID WHERE MADE, ARE FAIR AND REASONABLE, AND SHOULD BE UPHELD.

It is a familiar rule that the validity of a contract is to be determined by the law of the state or country in which it is made and to be performed, and that a contract valid where made is ordinarily valid and given effect everywhere. *(Jamieson v. Potts,* 55 Ore. 292, 300; *Shaw v. Postal Tel. Cable Co.,* 79 Miss. 670, 31 So. 222, 56 L. R. A. 486; 5 R. C. L., 931, 934; 13 C. J. 253.)

There may be some exceptions to this rule, but none within which falls the venue stipulation in the policies. It is not immoral, and is not, in the language of the Supreme Court of Massachusetts in *Mittenthal v. Mascagni,* infra:

> "So improvident and unreasonable — such an abnegation of legal rights — that the government, for the protection of mankind, will refuse to recognize it," etc.

The German insurance law of May 12, 1901, Article 9, required that certain conditions should be contained in every life insurance policy issued in Germany and among these were (Trans. Rec. 75, 77):

> "The manner, the extent and maturity of the obligation on the part of the assurer.

> " * * * The proceedings in cases of dispute arising from the assurance contract, the competent court, and the appointment of a court of arbitration."

When defendant was admitted to transact business in Germany, it at once, as to the business transacted there, became subject to German law. The type of policy issued and the terms thereof were such as were prescribed by those laws.

The venue provisions in the three policies are identical. A copy of one policy is attached to the amended complaint (Trans. Rec. 54). It is alleged in the amended complaint that the other two policies are identical except as to numbers (Trans. Rec. pp. 2-b, 2-e, 2-i). These venue provisions (Trans. Rec. 104) specified the German court of the residence of the chief attorney in fact for Germany or the German court within whose jurisdiction was located the German agency through which the insurance policy was issued, if appointed according to Paragraph 115 of the German insurance laws. Each policy was negotiated and issued at Berlin, where the chief attorney in fact and the secretary for Germany resided and they were appointed pursuant to said Section 115 (Trans. Rec. 446-7-8-9).

Mr. Buckner says (Aff. Trans. Rec. 448):

> "The policy contains a clause headed 'Jurisdiction and Domicile within the Country', and this vests in certain specified courts of Germany

exclusive jurisdiction of all actions growing out of or based on the policy."

The affidavit then sets out the venue provisions, and continues (P. 449):

> "At the time said policy (referring to one of the Heine policies) was applied for and issued the insured was engaged in business in and was a resident of Berlin, Germany, where the chief or principal office of the defendant in Germany was located, and where its chief representative for Germany resided, and to the courts of which he was subject, and ever since then the insured has continued to reside in said Berlin," etc.
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> * * * * * *
>
> "At all times since 1904 the defendant has maintained * * * in Germany a general representative and attorney-in-fact appointed pursuant to the aforesaid §115 of said laws of Germany Relating to Private Insurance Enterprises, and upon whom process issued out of any of the courts of Germany and directed to defendants might be served. * * * In no action commenced in Germany upon a mark policy issued in Germany has defendant sought to evade the jurisdiction of the German courts or to invalidate service made in Germany upon defendant's said representative in Germany."

Dr. Arthur Burchard discusses these venue stipulations, their validity and effect under German law, and cites and attaches to his affidavit several German decisions holding that no court other than the one specified may take jurisdiction (Trans. Rec. 206 et seq.; *Dessau v.*

N. Y. Life, Trans. Rec. 405 et seq.; *Rinck v. N. Y. Life,* Tran. Rec. 414 et seq.)

The American courts generally have refused to enforce contract stipulations which prevent citizens from applying to the courts of their own states. Venue stipulations entered into by a non-resident alien, vesting jurisdiction in the courts of his own country, are an entirely different matter. Typical reasoning for the rule of invalidity is found in the case of *Myers v. Jenkins,* 63 Ohio St. 101, 57 N. E. 1089, where it was said:

> "The whole state has an interest in all its inhabitants, and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract, in advance, deprive himself of the right to appeal to them."

In *Gregonius v. Philadelphia Co.,* 235 N. Y. 152, 139 N. E. 223, it was said:

> "The courts of this state are primarily for the residents of this state. There must be some forcible, controlling reasoning entering into the very nature and essence of the action which would close their doors to its own citizens."

Contemporaneously with the development of the doctrine of invalidity of contractual stipulations depriving a person of the right to resort to the courts of the state of which he was an inhabitant, the courts, both

here and in England, were upholding provisions locating the venue of foreign actions in the courts of the residence of the alien plaintiff.

In *Geiner v. Meyer,* (1796) 2 H. Bl. 603, the Lord Chief Justice said:

> "Although no persons in this country can by an agreement between themselves exclude themselves from the jurisdiction of the King's Courts, yet when the parties are foreigners, bind themselves, in their own country, not to sue in any other, * * * I think we ought to look into the contract * * * that we may not do anything here unjust or contrary to the laws of that country. Now it appears to me to be good according to my apprehension of those laws or at least as there is no evidence to show it is not good, we must presume it to be so. Then the first thing that stares us in the face is an agreement that they will not resort to our laws. There is nothing unreasonable in this; the parties are domiciled in Holland, the contract is to perform the whole voyage ending in Holland and to seek their remedy in their own courts of justice."

In *Thompson v. The Catherine,* (1795) 1 Pet Adm. 104, Fed. Cas. 13949, the court said:

> "On several occasions, I have seen it part of the contract, that the mariners should not sue in any other than their own courts — and I consider such a contract lawful. It would be against law and void, as it were, that the mariner should not sue in any case; or that he should not sue in the proper court or courts of his country."

In the case at bar the contracts do not prevent the plaintiff from resorting to the courts of his own country. The right to do so is stipulated in the contract. The courts have frequently seen cogent reasons in favor of such a stipulation. Lord Ellenborough, in *Johnson v. Machielsen,* (1811) 3 Camp. 44, in upholding such a stipulation, said:

> "There may be great reasons for protecting the captain (defendant) from suits in foreign countries. It is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg court."

In The Cap Blanco, 29 T. L. R. 557 (1913), the High Court of Admiralty had before it the claim of the Anglo South American Bank against a German vessel. The action was to recover damages for breach of a contract to deliver certain cases of German coin at Montevideo or Buenos Aires, and was instituted at Southampton by arrest of the vessel. The contract, or bill of lading, provided that any disputes concerning the interpretation thereof should be decided in Hamburg according to German law. The Court said:

> "There remains to be considered Clause (14) of the bill of lading which provides that any disputes concerning the interpretation of this bill of lading are to be decided in Hamburg according to German law. It appears from the affidavit of Mr. Stokes that the defendants contend that they are protected from liability for the claim in

this action by the exceptions contained in the bill of lading, and this action involves, in my opinion, a dispute concerning the interpretation of the bill of lading within the meaning of Clause 14. * * * The tribunal at Hamburg is not specified, but a fair business-like reading of the contract means that such disputes are to be tried by the competent Court in Hamburg and in accordance with German law. It is conceivable that the parties agreed to that clause in the bill of lading in order expressly to avoid a trial here under the jurisdiction which I decide exists in this Court. In dealing with commercial documents of this kind effect must be given, if the terms of the contract permit it, to the obvious intention and agreement of the parties. I think the parties clearly agreed that disputes under the contract should be dealt with by the German tribunal, and it is right to hold the plaintiffs to their part of the agreement. Moreover, it is probably more convenient and much more inexpensive, as the disputes have to be decided according to German law, that they should be determined in the Hamburg Court. Although, therefore, this Court is invested with jurisdiction, I order that the parties may litigate in Germany as they have agreed to do."

Austrian Lloyds S. S. Co. v. Gresham Life Assurance Society (1903), 1 K. B. 249, was an action upon a life insurance policy issued by an English company having a branch office at Budapest, upon the life of one Rabl, a native of Trieste. It was assigned to the plaintiff in the

action. The policy was written in the French language. It was made subject to certain general conditions annexed thereto, and among others:

> "For all disputes which may arise out of the contract of insurance, all parties interested expressly agree to submit to the jurisdiction of the courts of Budapest having jurisdiction in such matters."

The trial court declined to give effect to this stipulation and the case was brought to the Court of Appeals. That court held that the stipulation was fair and reasonable and upheld it, Lord Justice Mathews among other things saying:

> "It might be of great importance to the insurance company, in case of a dispute arising under a policy of insurance effected at Budapest, that they should not have to bring witnesses from thence to distant places."

See also:

> *In re Belgenland,* 114 U. S. 355, 29 L. Ed. 152; *Olzen v. Schierenberg,* 3 Daly 100.

Mittenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, is a leading case upholding the venue stipulation in a contract entered into in a foreign country.

Mittenthal was a citizen of the United States and a resident of New York, just as appellee is a citizen of New York. Mascagni was a subject of Italy, residing in Florence, in that country. The contract was entered into in Florence, the home of the defendant. By the

terms of the contract defendant, a famous Italian composer, undertook to direct certain concerts and present certain operas composed by him, in such parts of the United States and Canada as plaintiff should designate. The services of the defendant were not to be performed in Italy. The contract was in the Italian language and contained this provisions, among others:

> "Whatever difference or question there might arise between parties, including the agent, will be acted upon by the civil authorities of Florence, Italy."

Another provision reserved to Mascagni the right to bring an action in the courts of New York for payment of the compensation agreed upon.

Although he was a citizen of the United States and a resident of New York, plaintiff elected an Italian domicile for the purposes of the contract and the vesting of Italian courts with jurisdiction of controversies arising thereon, just as in the case at bar The New York Life Insurance Company, as required by the laws of Germany, elected a German domicile for all purposes connected with its German insurance business. The Court first considered the interpretation to be given to the quoted provision of the contract, and said:

> "The first and principal question is, What is the effect of the stipulation in regard to the adjustment of difference or questions between the parties? We have little doubt that it was meant to give exclusive jurisdiction of all such matters

to the Italian court; saving only jurisdiction of suits by the defendant to recover his compensation, which is given to the courts of New York."

The court assumed that the provision was legal and binding in Italy under the laws of that country, reviewed some of the cases which had adopted the so-called invalidity rule, such as an agreement by a citizen that he would not resort to the courts of his own state, or an agreement ~~of the parties not to resort to any court, and then said:~~ by one or both of the parties not to resort to any court, and then said:

"Perhaps the tendency in modern times is to permit greater freedom in contracting matters of this kind than formerly. *Miles v. Schmidt*, 168 Mass. 338, 47 N. E. 115; *Daley v. People's Building & Loan Association,* 178 Mass. 13, 59 N. E. 452. In most cases — certainly in a case like the present — there is no occasion for the protection of the dignity or convenience of the courts. The contract was between citizens of foreign states, who, so far as our tribunals are concerned, well might make any reasonable arrangement for the settlement of disputes.

"The determining question seems to be whether such a contract as this is was so improvident and unreasonable — such an abnegation of legal rights — that the government, for the protection of mankind, will not recognize it, even when made in a foreign country by citizens or subjects of that country."

The court then pointed out that defendant would be in many jurisdictions during the term of the contract, and as he might be sued anywhere and put to great trouble and expense, it seemed reasonable for both parties to provide that any controversy that might arise should be settled by a court designated in the contract, and, concludes the court, in sustaining the venue stipulation and dismissing the case:

> "If, moved by such considerations, the parties made the agreement in question, shall the court say that they were non compos mentis, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?"

The same court in *Nashua Co. v. Hamermill Co.,* 223 Mass. 8, 111 N. E. 678, reaffirmed the foregoing decision and expressly declared that the two rules are not inconsistent. In that case, the plaintiff was a citizen of the forum and a stipulation forbidding action in his own court was held invalid.

THE APPELLEE, AND ALL ITS ASSETS LOCATED IN GERMANY, ARE UNDER THE CONTROL AND SUPERVISION OF THE GERMAN GOVERNMENT; THE RIGHTS AND REMEDIES WHICH APPELLEE IS REQUIRED TO GIVE, AND TO WHICH APPELLANT AND ALL OTHER HOLDERS OF GERMAN INSURANCE POLICIES ISSUED BY IT ARE ENTITLED, UNDER THE GERMAN CURRENCY AND VALORIZATION LAWS AND DECREES, ARE SPECIAL AND ADMINISTRATIVE IN CHARACTER AND ARE NOT SUCH AS THE AMERICAN COURTS ARE COMPETENT TO ADMINISTER.

Preliminary to a discussion of the laws of Germany, we will briefly state, and cite authorities to sustain, certain propositions as a premise to the discussion.

(a) The construction of a contract and the extent of the liability under it are determined by the law of the place where it became effective and is to be perpormed (*Jamieson v. Potts,* 55 Ore. 292, 300, 12 C. J. 448, 5 R. C. L. 931; *Shaw v. Postal Tel. & Cable Co.,* 79 Miss. 670, 31 So. 222, 56 L. R. A. 486).

(b) This rule is uniformly applied to contracts of insurance, whether entered into by mutual companies or non-mutual companies (*Northwestern Life Ins. Co. v. McCue,* 223 U. S. 234; *Mutual Life Ins. Co. of N. Y. v. Cohen,* 179 U. S. 181, 179 U. S. 262; *Mutual Life Ins. Co. v. Hill,* 193 U. S. 551; *Daggs v. Oriental Ins.*

Co., 156 Mo. 383, 35 L. R. A. 227, 172 U. S. 557; 32 C. J. 976).

(c) And where a cause of action arises in a foreign country the courts here will only grant such relief as the suitor could have secured had the action been brought in the courts of the country where the cause of action arose (*Slater v. Mexican Nat'l Ry. Co.,* 194 U. S. 120, 126; *Sokolof v. National City Bank,* 139 Misc. Rep, 66, 22 N. Y. Supp. 102 (aff. 250 N. Y. 69); *Zimmerman v. Sutherland,* 274 U. S. 253; *4 Sedgwick on Damages* (9th Ed.), 2758).

(d) The German courts have uniformly held that the insurance policies issued in Germany to German nationals by appellee and other insurance companies are German contracts and that their construction, the extent of the liability thereunder and in what manner it may be enforced or discharged, are determinable exclusively by German law. This is of first importance inasmuch as appellee has a legal domicile in Germany, has large assets there, has complied with all of the requirements of the German government with regard to providing a valorization fund out of which all policy liabilities as determined by German law are to be paid, and the German government, assuming exclusive jurisdiction to deal with the rights of its own resident nationals, is administering the fund for that purpose.

We now cite some of the many cases decided by the

German courts and the German Insurance Board which have so held:

Ferensdorff, nee Herz v. Swiss Life Insurance Annuity Institute, a mutual life insurance company of Switzerland, decided by the Supreme Court of Germany — the highest court — December 18, 1929 (Burchard Aff. Trans. Rec. 181, Ex. "N", Trans. Rec. 291, 293).

Messerschmitt v. N. Y. Life Ins. Co., decided by the Berlin Court of Appeals (next to the highest court in Germany), March 12, 1930 (Burchard Aff. Trans. Rec. 186, Ex. "O", Trans. Rec. 298, 305).

Hardt v. N. Y. Life Ins. Co., decided by the Berlin Court of Appeals March 12, 1930 (Burchard Aff. Trans. Rec. 186, Ex. "P", Trans. Rec. 309, 318).

Marx v. N. Y. Life Ins. Co., decided January 27, 1930, by the Hessian Landgericht (District Court), (Buchard Aff. Trans. Rec. 188, Ex. "Q", Trans. Rec. 324, 330).

Protective Ass'n of Holders of Foreign Insurance Policies v. Swiss Life Insurance Annuity Institute, decided by the Munich Court of Appeals April 15, 1929 (Burchard Aff. Trans. Rec. 188, Ex. "R", Trans. Rec. 338, 346).

The above mentioned decision of the Munich Court of Appeals was affirmed by the Supreme Court of Ger-

many on February 21, 1930 (Burchard Aff. Trans. Rec. 188, Ex. "S", Trans. Rec. 354, 356).

Daunert v. Guardian Life Ins. Co., a decision by the Berlin Court of Appeals (Burchard Aff. Trans. Rec. 192, Ex. "T", Trans. Rec. 363, 364).

Decision of the German Insurance Board October 25, 1928, in the matter of New York Life Insurance Company (Burchard Aff. Trans. Rec. 178, Ex. "K", Trans. Rec. 258, 268).

Decision of the Appellate Division, February 13, 1929, affirming the above mentioned decision of the German Insurance Board (Burchard Aff. Trans. Rec. 178, Ex. "L", Trans. Rec. 272, 280).

(e) The American courts will not inquire into the validity, wisdom or justice of the laws or acts of the German government or its agencies. The jurisdiction of a nation over persons and things within its own territory is exclusive. It might seem that this proposition is too elementary to require mention or citation of authority, but the contrary has heretofore been vigorously asserted by counsel for appellant, and may be again asserted in this court, based upon some view or theory that the German currency and valorization laws and decrees of 1924 and 1925 changed the contractual relations of the parties and would therefore be held invalid by the American courts (33 C. J. 397; 15 R. C. L. 130; *Herman v. Phalen,* 55 U. S. 79; *Gebhard v. Canada So. Ry Co.,* 109 U. S. 257; *League v. De Young,*

52 U. S. (11 How.) 185; *Underhill v. Hernandez,* 65 Fed. 577, 38 L. R. A. 405, 168 U. S. 250; *Hewitt v. Speyer,* 250 Fed. 367; *Shaw v. Postal Tel. Cable Co.,* supra).

German currency legislation and the status of the German mark and mark contracts prior to the monetary laws of August 30, 1924.

Shortly after Germany assumed the status of an empire, following the Franco-Prussian war, it established a unified currency on a gold basis, that is, while its circulating medium was mostly paper, it was redeemable in gold. The unit of value was the mark. All the German insurance policies issued by appellee were expressed to be payable in Mark D. Rwg., which is an abbreviation for Marks Deutsches Reichswehrung, and means marks in the currency of the German Reich.

Prior to 1904 the appellee had obtained concessions from various German states to transact an insurance business. In 1904 it obtained a concession from the German Reich permitting it to transact business throughout Germany.

It was required by this concession and the German laws to keep, and it did keep in Germany and under the control of the German government, the full legal re-

serve for all policies issued in Germany, which means that it was required to keep sufficient funds and investments in Germany to meet at any time all obligations on the policies issued in Germany. The German law further required that all these reserves be kept invested in certain specified German mark securities, and in obedience to these requirements all of its reserves were invested under the control of the German Insurance Board in German Imperial, state and municipal bonds, and in loans to policyholders, and all of these ivestments or loans were payable in Marks D. Rwg.

Not only was appellee required to keep all of the premiums collected on German policies invested in Germany, but in addition it was required to deposit with the German insurance authorities, as a condition to the granting of the concession to transact business, two million marks, and during the war, to meet the unexpected mortality losses, made a further deposit out of non-German assets of 11,607,000 marks (Buckner Aff. Trans. Rec. 452, et seq.).

The affidavit of Mr. Peter A. Schwabe, filed by appellant in this case, brought into the record some circulars issued at Berlin by the chief representative of appellee for Germany during the war. One of these circulars (Trans. Rec. 458) states:

> "These headquarters will — no matter how the relations with the United States may develop — continue to carry on its German business as heretofore. It arrives at all decisions about

> German insurance contracts independently and disposes over entirely adequate money resources to meet all obligations to German insured. * * * It is especially pointed out that for all German insurance contracts here in Germany a full premium reserve, that is the current value of each policy is safely deposited. All liquid securities in the premium reserve which according to the quotations of the exchange of January 5, 1917, had a current value of 78,090,815 marks, are so deposited that they cannot be disposed of without the consent of the Imperial Supervising Office for Private Insurance."

Another of these circulars attached to the affidavit of Mr. Schwabe states (Trans. Rec. 549, 551):

> "The resources of the German branch are entirely sufficient to respond to all claims on German insurance contracts. Since the outbreak of the war we have acquired roundly 15,000,000 marks of German war loans for our deposits in Germany."

The mark currency in which the policies were made payable and in which all of the investments and loans of appellee in Germany were also made payable, continued to be the circulating medium and legal tender of that country until the passage of the Monetary Act of August 30, 1924, which, as will be hereafter more fully pointed out, created an entirely new currency called the Reichsmark, and provided that the old mark should be converted into the Reichsmark on the basis of one million millions of the former for one of the latter, and that con-

tracts payable in the old mark might be paid and discharged by payment in Reichsmarks at that ratio.

At the outbreak of the World War Germany suspended specie payment, or redemption, which was never thereafter resumed so far as the old currency was concerned. Similar measures were taken by all of the belligerent countries in Europe and by some of the neutral countries elsewhere. A few years after the war England successfully restored the pound sterling to its pre-war exchange value. France found it necessary to stabilize the old currency at approximately one-fifth of its pre-war value. So with Italy and Belgium. All contracts made before the war or during the war, payable in these currencies, may be paid in the depreciated currency by paying the number of units called for in the contracts.

The currencies of these countries did not suffer the great depreciation suffered in some other countries, as, for instance, Germany, Russia, Austria and Bulgaria. These countries did not undertake to retain the old currency or restore it to a pre-war exchange basis, but because of the tremendous quantity of currency issued and the depreciation which carried its value down to the vanishing point, new currencies and new units of legal tender were provided (Buchard Aff. Trans. Rec. 150 to 162).

Up to a short time before the end of the war the depreciation of the German mark was slight. Follow-

ing the war, due to a number of causes, the exchange value of the mark steadily decreased. The war had wasted much of the man power and of the accumulated wealth of Germany. Its industries were disorganized. The iron mines of Alsace and Lorraine and the gold mines of the Saar Basin and Silesia were taken away. Its colonies were divided among some of the allied powers. A part of Schleswig-Holstein was returned to Denmark, some German territory was given to Belgium, German Poland was incorporated into the new Poland, large forces of allied troops continued to occupy the Rhineland provinces, and the heavy burden of enormous reparations, yet undetermined in amount, further impaired the credit of the nation. The transition from a monarchy to a republic had been attended with some serious internal disturbances, and up to 1923 or 1924 the new government was not very secure. As the mark depreciated more were issued, which in turn caused further depreciation. By the fall of 1923 the quantity of marks which had been issued and were in circulation, if redeemed or retired at their nominal pre-war value, would equal, according to a distinguished German economist, many times the total wealth of the world.

During this time, and up to the enactment of the Monetary legislation hereinafter referred to, on August 30, 1924, no legal change had been effected in the mark as the unit of Germany. All debts payable in marks continued to be payable in marks, however depreciated.

In November, 1923, so great had become the depreciation of the mark, that one million millions thereof had the purchasing power of a gold mark, or about 23.85 cents in American money. On October 15, 1923, one of the early steps toward the creation of a new currency was taken when provision was made for a rentenmark, which was a currency secured by an enforced lien on certain classes of property in various states and districts of Germany, following the example of Denmark after the Napoleonic wars. At that time, in accordance with the fact, it was provided that one million millions of the old marks should be equal in value to one Rentenmark.

The German courts and the courts of every other country that passed on the question held that old mark contracts entered into prior to the Monetary Act of August 30, 1924, might be discharged by payment of the number of marks, without regard to depreciation, called for by the contract. Since the Monetary Act of August 30, 1924, was enacted, it has been uniformly held by the German courts and other courts that contracts payable in marks made before such legislation was enacted may be discharged by payment in Reichsmarks, the new unit, on the basis of one for each million millions of the old marks, that being the rate of conversion fixed by law.

For a time, in 1922, 1923, and the early part of 1924, some of the subordinate German courts sought to mitigate the hardship thus imposed upon needy creditors by

the application of Section 242 of the German Civil Code, which, translated into English, reads substantially thus:

> "The debtor is obliged to perform in such manner as faith and credit with regard to custom requires."

This provision had been in the German Code for a long time and was not supposed to have any application to contracts which particularly specified the medium in which, and the time when, payment should be made. However, some of the German courts evolved the doctrine that under this provision the terms of the contract might be disregarded and the necessities of one party, the capacity of the other party to pay, the economic conditions of Germany generally, the situation of the parties to the litigation and their dependents, the public interest in the matter, the loss or gain of either party to the obligation, and many other factors, might be considered in determining what the debtor should pay and the creditor should receive.

This obviously impracticable plan broke down and was wholly abandoned in favor of valorization laws which will be hereafter discussed, and which created administrative tribunals with exclusive power to administer and distribute moneys and properties going into the valorization fund.

Of course all classes of creditors suffered alike. Foreign insurance companies transacting business in

Germany, as was appellee, were compelled under German law to keep all of their premium reserves on policies issued to German citizens invested in Germany in German securities ,and these were payable in the same kind of marks as were the policies which they issued.

These matters are discussed in the affidavit of Dr. Burchard (Trans. Rec. 148, et seq.).

As heretofore stated the courts of Germany, and the courts of other countries which passed on the question, held that the extent of the legal right of a creditor under a German mark contract prior to the German Monetary legislation of August 30, 1924, was to recover the number of marks specified in the contract, or, if paid in another country, the exchange value thereof converted into the currency where paid, except insofar as some German subordinate courts for a time, under Section 242 of the German Civil Code above referred to, undertook to give an uncertain and variant relief, not based on the contract, but upon extrinsic considerations not recognized as a basis for recovery by the jurisprudence of other countries.

These statements are fully supported by the following decisions of German courts:

A decision of the Supreme Court handed down April 16, 1921, and reported in the Official Reports of Civil Cases, volume 102, at page 98 (Burchard Aff. Trans. Rec. 157, Ex. "B", Trans Rec. 215, 217).

A decision of the Supreme Court, handed down June

23, 1927, and reported in the Official Reports of Civil Cases in volume 118 at page 370 (Burchard Aff. Trans. Rec. 162, Ex. "D", Trans. Rec. 222, 225).

A decision of the Supreme Court handed down June 6, 1928, and reported vol. 121, p. 203, Official Reports of Civil Cases (Burchard Aff. Trans. Rec. 164, Ex. "E", Trans. Rec. 227). This is a most interesting decision. It discusses the German currency legislation prior to, at the opening of and after the war, and reviews the decisions of the German, English, Norwegian, French, and other courts.

A decision of the Supreme Court handed down January 11, 1922, and reported in Volume 103, at page 384, Decisions of the German Supreme Court (Burchard Aff. Trans. Rec. 167, Ex. "F", Trans. Rec. 233, 235).

A decision of the Supreme Court, rendered December 18, 1920, and reported in Volume 101, at page 141 of the Decisions of the Supreme Court (Burchard Aff. Trans. Rec. 170, Ex. "H", Trans. Rec. 240, 246).

A decision of the Court of Appeals of Berlin, handed down March 12, 1930, in the case of *Messerschmitt v. N. Y. Life* (Burchard Aff. Trans. Rec. 182, Ex. "O", Trans. Rec. 298, 305, 306, 307).

A decision of the Court of Appeals of Berlin, handed down March 12, 1930, in *Hardt v. N. Y. Life* (Burchard Aff. Trans. Rec. 186, Ex. "P", Trans. Rec. 309, 318, 319, 323).

A decision in *Marx v. N. Y. Life,* rendered January 27, 1930 by the Hessian District Court (Burchard Aff. Trans. Rec. 188, Ex. "Q", Trans. Rec. 324, 335).

A decision in the case of *Protective Ass'n of Holders of Foreign Policies v. Swiss Life, etc. Co.,* rendered April 15, 1929, by the Court of Appeals of Munich (Burchard Aff. Trans. Rec. 188, Ex. "R", Trans. Rec. 338, 346, 349, 352).

A decision of the Supreme Court affirming the decision of the Court of Appeals of Munich, supra (Burchard Aff. Trans. Rec. 192, Ex. "S", Trans. Rec. 354, 356, 357, 361).

It will be seen from an examination of these cases that the German courts have uniformly held that insurance contracts payable in the German mark of the old currency, that is, the currency in circulation prior to August, 1924, as well as all other mark contracts, might be discharged by payment of the number of marks called for regardless of their depreciated value; that the German laws did not contemplate anything in the nature of a standard currency; that such contracts contained no guaranty, express or implied, of the stability of the currency; that the policies issued by mutual insurance companies were upon the same footing as other mark contracts, and that statements in policies, prospectuses or other literature to the effect that the reserves and surpluses of a mutual company belonged to all the policyholders, etc., did not give the policyholder

a right to demand or receive more than the number of marks specified in his policy. These, of course, were essentially internal questions concerning which Germany had exclusive power and jurisdiction, and the decisions of its courts defining the rights of its nationals and others domiciled in Germany and transacting business there, under mark contracts, are controlling upon and will be given effect by the courts everywhere.

The Supreme Court of the United States had before it several cases based on contracts payable in the German marks in circulation and constituting the legal tender of Germany prior to the Monetary legislation of 1924; in other words, the marks in which the German insurance policies of appellee are payable.

Deutsche Bank v. Humphrey, 272 U. S. 517, 71 L. Ed. 383, was a suit brought to reach certain property seized and paid into the Treasury by the Alien Property Custodian in satisfaction of a debt payable in German marks. Among other things, the Court said (P. 519):

> "In this case, unlike *Hicks v. Guinness,* 269 U. S. 71, 70 L. Ed. 168, 46 Sup. Ct. Rep. 46, at the date of the demand the German bank owed no duty to the plaintiff under our law. It was not subjct to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose. * * * A suit in this country is based upon an obligation existing under the foreign law at the time when the suit was brought, and the obligation is not enlarged by the fact that the creditor happens to be

> able to catch his debtor here. * * * We may assume that when the bank failed to pay on demand its liability was fixed at a certain number of marks, both by the terms of the contract and by the German law — but we also assume that it was fixed in marks only, not at the extrinsic value that those marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See *Societe des Hotels, etc. v. Cummings* (1922), 1 K. B. 451 - C. A."

In *Sutherland v. Mayer,* 272 U. S. 292, 70 L. Ed. 943, the Court announced the same doctrine.

In *Zimmerman v. Sutherland,* 274 U. S. 253, 71 L. Ed. 1034, the same conclusion was reached concerning an obligation payable in the old currency of Austria-Hungary, which. like the German currency, depreciated in value to the vanishing point and was later superseded by an entirely new currency with a conversion rate fixed by law between the old and the new.

In the case of *Chesterman's Trust* (1923), 2 Chancery, 466, the court had before it a debt payable in Germany in marks which at the time the cause of action accrued had greatly depreciated, and it was held the debt might be paid in the depreciated marks or in

their exchange value converted into British currency. On this basis the debt, which had a gold value when contracted of about 1600 pounds sterling, was held to be payable in marks which had an exchange value of about two pounds.

The same doctrine was applied in *British Bank v. Russian Bank* (1921), 38 T. L. R. 65. It appeared that the British Bank in 1914 borrowed 750,000 roubles, having an exchange value at that time of upwards of 75,000 pounds. Collateral had been deposited by way of security. The action was to redeem the collateral upon payment of the depreciated value of the original loan, or about twenty pounds. This was allowed. The court rejected an appeal to sympathy made by the creditor, Mr. Justice Russell saying that he —

> "Had great sympathy with the defendants, but it must be remembered that the same causes that caused the fall in the value of roubles had produced great depreciation in the plaintiff's securities."

In *Anderson v. Equitable Assurance Society* (1926), 134 L. T. 557, the court had before it an insurance policy taken out in Russia, payable in London in German marks. The court held that the policy did not stipulate payment in standard or gold currency and that the contract might be discharged by paying the number of marks of the kind specified in the policy or their exchange value in British currency, and accordingly a

60,000 mark policy was discharged upon payment of the sum of approximately one shilling.

Decisions of French, Austrian, Jugoslavian and other courts, and by the Tripartite Claims Commission set up in this country, and of which Judge Parker was chairman, are to the same effect:

Credit Lyonnais v. Credit National, Cour d'Appel de Paris, decided Feb. 18, 1927.

Maslova v. Urbaine Life Ins. Co. (4th Chamber, Tribunal of Commerce, Dept. of the Seine), Paris, decided July 19, 1926; reported fol. 156, case 6.

Bauchon v. Credit Lyonnais (1st Chamber, Civil Court), decided Oct. 26, 1925; affirmed by Court of Appeals of Paris, Dalloz Law Reports, June 17, 1927.

Banque Hypothecaire de Bale v. Riegart, Cour de Cassation, decided Jan. 23, 1924; reported in Gazette des Tribunaux April 28-29, 1924.

Banque Hypothecaire v. Riff, decided Jan. 11, 1926, Dalloz L. R. 1926, p. 85.

Ghan v. Orloff, Dalloz L. R. 1927, p. 62.

Decision Supreme Court of Austria, Jan. 18, 1927, Ob. III 993-28 "Zentralblatt" No. 102 ex 1927.

Decision of May 25, 1927, by Tripartite Claims Commission, 21 Am. Journal International Law, 610.

It is not probable that reports of the decisions of the French, Austrian and Jugoslavian courts, supra, are

available to this court. We have in our files copies of the decisions and they will be made available, if desired.

German monetary legislation of August 30, 1924.

On August 30, 1924, Germany enacted a monetary law which created a new and distinct currency, the unit of which is called the Reichsmark. The Reichsmark has a gold value of about twenty-four cents, or substantially the same as the mark prior to the World War. This legislation provided for the conversion of the mark into Reichsmarks at the rate of one million-million of the former to one of the latter, and for the payment of existing mark indebtedness in Reichsmarks at this conversion ratio.

Article 6 of this Act among other things provided:

> "Insofar as a debt may be paid in marks of the former currency, the debtor is entitled to effect the payment on the ratio that one million million marks are equal to one Reichsmark."

On the same date a companion act was passed containing these provisions, among others:

> "The Reichsmark is bound to call up the total amount of old notes in circulation and to exchange them for Reichsmarks. One million million marks of former issues shall be replaced

by one Reichsmark. The redeemed notes shall be destroyed. Detailed regulations for the calling up of the old notes and for the periods of time to be fixed for their delivery and cancellation shall be determined by the directorate of the Reichsbank."

On October 10, 1924, the first decree was promulgated for carrying said legislation into effect and Article I thereof provides that one million million marks of former currencies are equal to one Reichsmark (Burchard Aff. Trans. Rec. pp. 159, 160, Ex. "C", Trans. Rec. p. 219).

The course pursued by Germany in creating a new currency unit and providing for the payment of obligations payable in the old currency by paying a certain number of units of the new currency according to the ratio fixed by law, is not unusual in the history of the world. Following the World War, this course was also adopted by Russia, Austria and Bulgaria.

In *I Sedgwick on Damages,* Sections 267, 268 (9th Ed.), it is said:

"In case of a contract to pay a specified sum of money there is usually no difficulty in estimating the amount to be paid. The monetary system of a country may, however, between the time of the contract and the date of payment, be disturbed and altered in one of two ways: The currency may become depreciated, or a new standard may be adopted. In such cases the contract will be discharged by due payment in any

money which by law is made of equivalent value at the time of payment.

"Where an entirely new standard of value is adopted by the government, the amount to be paid is found by giving such a sum in the new currency as shall be declared by law equal in value to the amount due in the old currency."

Readjustments following the Revolutionary War brought about somewhat analogous conditions. (*Faw v. Marsteller,* 2 Cranch, 10-25; *Robinson v. Noble,* 8 Peters, 181, 189).

In Puerto Rico, after it passed from Spain to this counery, a new currency was established by Act of Congress. The unit of the old currency was a peso of 100 centavos. The law provided that sixty cents of the new currency should equal 100 centavos or one peso of the old, which was the relative exchange or purchasing values of the two currencies at the time of the substitution. Contracts payable in the old currency were made payable in the new at the ratio stated. In *Serralles Successor v. Esbri,* 200 U. S. 103, it was contended that contracts made before the new currency act was passed, but payable or maturing afterwards, could only be discharged by paying in the new currency the number of units thereof called for in the old currency. The court rejected this contention holding in effect that a new currency might be lawfully substituted for an old at the rate of conversion fixed by law.

Construing the monetary legislation of August 30,

1924, and the decrees putting the same into effect, the German courts have uniformily held that, except as to the rights given under the valorization laws, hereinafter discussed, any contract payable in the old mark may be discharged by payment in Reichsmarks at the conversion rate fixed by the legislation. This applies to all mark contracts where the legal relation was entered into prior to February 14, 1924, that is, where the mark contract went into effect prior to that date (Trans. Rec. pp. 306, 316). This is the rule stated and applied in the German decisions cited supra.

The Supreme Court of Germany in its decision of June 23, 1927, reported in Volume 118 of the Decisions of the Supreme Court, page 370, also cited supra, said (Trans. Rec. 162, 222, 226):

> "In this connection the subject matter is represented in the first place by the German laws relating to currency. When those legal provisions underwent alterations, the obligations of the defendant became subject to the altered provisions, as the defendant as well as the creditor, by agreeing upon payment in German currency had subjected themselves to German law. Consequently, Article 6, par. 3 of the Monetary Law of August 30, 1924, applies, according to which the debtor, insofar as a debt can be paid in marks of old currency, is entitled to effect the payment in legal tender in such manner that one million millions of marks is equal to one Reichsmark.
>
> "The question of the revaluation of the old

debt is something entirely different therefrom. In this connection the question of the applicability of German law must also be answered in in the affirmative. The cause of revaluation is the depreciation of the German mark and this question is part of the question as to what does the obligation consist of.

"The amount of a revaluation, if any, cannot be determined in the proceedings in this court."

Concerning this question, Dr. Burchard states (Trans. Rec., p. 162):

"Accordingly, it is now beyond controversy under the law of Germany, that, apart from the question of revaluation which I shall discuss later, old mark debts are payable on the basis that one Reichsmark is equal to one million millions of marks. As the smallest unit of currency now in force is one Reichspfennig, unless an old mark claim amounts to at least 1-100th of one million millions of marks, that it to say, 10,000 millions of marks, it is too small to be paid in any unit of currency in force at present."

Judge Purdy, in a decision of December 11, 1926, in the United States Court in China in the case of *Oliver v. Asia Life Ins. Co.,* gave to the German monetary legislation of August 30, 1924, the same construction that was subsequently given to it by the German Supreme Court. We have not been able to find this decision in any printed report but have in our files a complete copy of the text. The facts were: An insurance policy payable in German marks was issued in China to Oliver. On August

10, 1925, Oliver surrendered the policy and demanded the cash surrender value thereof of 54,800 marks, according to the terms of the policy. He demanded that number of the new Reichsmarks, making the contention that the Reichsmark was the legal tender of Germany at the time he made his demand and that he was entitled to 54,800 units of that currency. In other words, it was his contention that Germany had not created a new currency but that the Reichsmark was the old mark currency under a new name. Judge Purdy apparently falls into the error of assuming that the monetary legislation went into effect in June, 1925. It was put into effect by a decree in October, 1924. This error, however, does not affect his reasoning or conclusions. Among other things, Judge Purdy said:

> "If plaintiff had died on the 30th day of November, 1921, the beneficiary would have received 100,000 German marks which were at that time equivalent, at the then existing rate of exchange between Germany and the United States, to approximately four hundred and eight American gold dollars. From that time on plaintiff's policy of insurance rapidly diminished in value, measured in terms of American gold currency, until on the 14th day of November, 1924, it was worth to his beneficiary, in case of his death, the infinitesimal sum of one-fourth hundred part of one cent in American gold. Its surrender value from November 14, 1924, until June 5, 1925, was 54,800 German marks, which were actually worth to the insured one-seventh hundredth part of one one cent in American money — that is to say, it

required one billion of those marks to equal, at the then existing rate of exchange, 25 cents in our money. If plaintiff had died at any time between November 14, 1924, and June 5, 1925, his beneficiary would have been compelled to accept, in full satisfaction and settlement of defendant's liability, 54,800 German marks, which could have been purchased in the open market practically anywhere in the world for one-seven hundredth part of a cent in American money.

* * * * * *

"This contract, if performance had been required, could have been performed in all good faith by the parties thereto at any time within a year or two prior to the 5th day of June, 1925, and in accordance with its precise terms and spirit, by the payment of a very small fraction of one cent in United States gold, and that too, whether such a performance had been brought about by the death of the insured, or by the surrender of the policy for its cash surrender value in money. By what legerdemain, therefore, did this contract suddenly become worth, after the 5th day of June, 1925, thirteen thousand one hundred and fifty-two American gold dollars? The sole answer to that question is the claim of the plaintiff that upon that day the Republic of Germany abolished this old German paper mark as the legal and lawful currency of that country, and established in lieu thereof a gold mark one billion times more valuable than this old paper German mark with which this contract of insurance had been purchased, * * * and that thereupon this plaintiff had the right to receive

such gold marks in settlement of his claim under this policy. Such a proposition is startling, to say the least, and calls for something than mere sophistry or subtle logic in order to insure its acknowledgment and application by a court of justice.

* * * * * *

"2.— That the German Government had no such intention, with respect to the effect of that law upon its own citizens at home, is clearly shown by the various provisions contained in the law authorizing the retirement of the old paper German mark from circulation. Debts and obligations of Germany's own citizens were not required to be paid and settled for in terms of the new German gold mark — the law having made ample and equitable provision for the valorization of all such existing debts and obligations either under the old currency or according to equitable and just rights of payment and settlement in terms of the new German gold mark.

* * * * * *

"5.— If this identical contract of insurance had been made in Germany as it was made in China, and the plaintiff was now seeking to compel a performance in Germany as he is seeking to compel performance by decree of an American court in China, he would recover nothing, or at most, the value of his marks at the time this insurance policy was offered up for surrender to the defendant.

* * * * * *

"If Germany's currency had become worthless, as a matter of fact this contract of insurance

had also become worthless, and the act of the German Government in putting the old German mark 'out of its misery', had practically no legal effect upon the rights of the parties under this contract."

The case was dismissed upon the ground that the amount which the plaintiff could recover on his contract — but an infinitesimal fraction of one cent — fell within the rule 'de minimus non curat lex'.

The rule announced by Judge Purdy shortly thereafter had the approval of the British Supreme Court for China in the case of *Matteo Bros. v. Sun Life Insurance Co. of Canada* in which the policy involved was payable in Russian roubles. The policy was issued in 1917 just prior to the fall of the Kerensky government. The premiums were fully paid at the time the policy was issued, which matured in 1927. In 1926 the policyholder surrenderd the policy and demanded the cash surrender value and insisted he was entitled to be paid in the new Russian currency of 1926 the same number of roubles called for by the policy, although the old currency had been superceded by a new issue under a law which fixed the value of the old rouble at fifty billion thereof to one unit of the new currency. The court held that the policyholder could only recover on his contract the value of the old rouble at the conversion rate fixed by the Russian currency law of 1926; that the fact that the unit of new currency was called a rouble was quite immaterial and remarked:

"The government might have called their new coinage by the name of Trotsky or Lenin instead of gold rouble. The fact is the rouble of yesterday is not the rouble of today."

German valorization law of July 16, 1925, and enforcement decree of November 29, 1925, discussed.

In the following pages we will show that as to mark obligations falling within the valorization law and decree, which include all German policies of appellee, the only rights and remedies given are those given by the law and the decree; that the German government and appellee, with the approval of the Insurance Department of New York, have agreed upon the basis of valorization of all these policies; that all the German assets of appellee have gone into the valorization fund. These assets include not only all the premium reserves earned on German business, but also the initial deposit of two million marks made when the concession to do business was granted in 1904, the sums provided to meet war losses, amounting to about 11,607,000 marks, and 37,107,737 marks paid to Kronos in 1922 at the time the German business of appellee was taken over by that company. And all those sums were contributed out of assets accumulated from non-German business (Trans. Rec. 454 et seq. In addition, appellee is making a further

contribution of $3,000,000, or about 12,000,000 Reichsmarks out of non-German business (Trans. Rec. 454 et seq.). The administration of this fund, for the benefit of policyholders, and which gives them a great deal more than they would be entitled to under the terms of their policies, is entirely in the hands of the administrative officers, who have a broad discretion and with which the courts have nothing to do.

In this situation it seems clear that this court should not and will not attempt to enforce the rights given under the valorization laws of Germany, which are now the only rights appellant has, and will not seek to interfere with or determine the rights of the appellant in a fund in Germany now being administered by public authority there.

Slater v. Mexican National Railways Co., 194 U. S. 120.

Beyer v. Hamburg Co., 171 Fed. 582.

Schweitzer v. Hamburg Co., 78 Misc. 448; 138 N. Y. Supp. 944.

In The Falco, 15 Fed. (2) 604; Aff. 20 Fed. (2) 362.

The Surstad, 12 Fed. (2) 133.

Verdicchion v. McNab Co., 178 App. Div. 48; 164 N. Y. Supp. 290.

Delaware Co. v. Peck, 225 Fed. 261.

Logan v. Missouri Valley Co., 157 Ark. 528, 537; 249 S. W. 21.

In the Matter of People (Norske Lloyd Ins. Co.), 242 N. Y. 148; 151 N. E. 159.

Robinson v. Mutual Ins. Co., 182 Fed. 850; Aff. 189 Fed. 347.

On July 16, 1925, Germany enacted what has been referred to in earlier pages as the valorization law (Burchard Aff., Trans. Rec. 171). Copy of material parts of this law are attached to the affidavit as Exhibit "I" (Trans. Rec. 247). On November 29, 1925, a decree or ordinance was promulgated carrying the valorization law into effect (Burchard Aff., Trans. Rec. 172; Ex. "J", Trans. Rec. 249). Among other classes of obligations, there are included within the valorization law and decree insurance contracts issued in Germany prior to February 14, 1924, by appellee and companies under the supervision of the German Insurance Board (Burchard) Aff., Trans. Rec. 177; Sec. 59 valorization law, Trans. Rec. 247; section 95, decree of Nov. 29, 1925, Trans. Rec. 249).

Under the valorization law and decree no general valorization (other than the right to exchange one million million of marks for one Reichsmark) is given. In the case of many classes of old mark contracts no valorization whatever has been provided. Among these are German national, state and municipal bonds, in which practically all the funds and reserves of appellee in Germany were invested. These investments may be regarded as wholly lost, as all appellee can recover is one Reichsmark for each million millions of marks called for by the

obligations. If these should later be rated up, which is unlikely, the policyholders will get the benefit as the obligations are under the control of the German Insurance Board.

The valorization law and decree took nothing from the policyholders. On the contrary, the result is to give them many times more than they would otherwise receive under the terms of their policies.

Under this law and decree holders of German mark insurance policies issued by supervised companies are entitled to the form of valorization therein set up, but not otherwise. Valorization is provided for only under extra-judicial administrative procedure. This is clear from what is said by Dr. Burchard (Trans. Rec. 171, et seq.), and the terms of the valorization law (Burchard Aff. Ex. "I", Trans. Rec. 247), and the decree putting it into effect (Burchard Aff. Ex. "J", Trans. Rec. 249).

Section 115 of the decree putting the valorization law into effect provides that claims against non-supervised foreign insurance companies are excepted from the provisions of the valorization law, or, stated differently, that only insurance policies issued by supervised companies come within the provisions of the law. It was also provided that decision as to whether a foreign insurance company was or was not supervised within the meaning of the valorization law was to be made by the German Insurance Board, and the decision of such Board was to be final and binding upon the courts.

It was not until sometime after the valorization law and decree went into effect that the German Insurance Board decided appellee was a supervised company. In the meantime a number of actions had been brought in the German courts against the appellee and other American insurance companies, and in these actions the courts declined to proceed to judgment until the German Insurance Board had determined which companies were or were not supervised, upon the ground that if a company was supervised its insurance policies fell within the provisions of the valorization laws and the remedies were administrative and not judicial.

On October 25, 1928, the German Insurance Board handed down a decision that the appellee was a supervised company (Burchard Aff., Trans. Rec. 178). A copy of this decision is in the record (Ex. "K", Trans. Rec. 258). An appeal was taken from this decision to the Appellate Division of the German Insurance Board, and on February 13, 1929, the Appellate Division affirmed the decision of the German Insurance Board holding that appellee was a supervised company (Burchard Aff., Trans. Rec. 178). A copy of this decision is in the record (Ex. "L", Trans. Rec. 272).

The decision of the Appellate Division is final and is not open to review by the courts (Trans. Rec. 179).

For some time prior to these decisions of the Insurance Board and Appellate Division, negotiations had been carried on between appellee and the Insurance

Board directly, and also through diplomatic channels, with regard to the contribution which should be made by appellee out of its non-German assets to the valorization fund. The Enforcement Decree of November 29, 1925, in substance provided that if the economic or financial condition of an enterprise made it feasible, then at the demand of the German Insurance Department, such enterprise must pay into the valorization fund certain sums or percentages of its contract obligations from its other property Trans. Rec. 481).

Inasmuch as any contribution made by appellee to the valorization fund must come from reserves in which other policyholders were interested, and would be in a sense extra-legal and beyond the terms of the German insurance contracts, it became necessary to submit the matter to the Insurance Department of the State of New York and secure its approval and consent. After making a study of the whole situation, the Insurance Department of New York declared that any contribution must not infringe on the rights of American and other policyholders, and must be according to some justifiable formula. The formula suggested was that the contribution should be such proportion of the contingent reserve as appellee may have had at the end of 1921 as the reserves on the German business bore to the total reserves of the company at the end of that year. The Insurance Department said that anything beyond this basis would be taking away something rightfully be-

longing to other policyholders and would not be justified (Trans. Rec. 482, 483).

The basis of the contribution thus outlined by the New York Insurance Department was agreed to, both by the appellee and the German Insurance Department, and in its decision of February 12, 1930, the agreement is set down (Buckner Aff., Trans. Rec. 459, et seq.; Ex. "A", Trans. Rec. 479, et seq.). This decision reviews the activities of the appellee in Germany, the conditions during and subsequent to the war, the depreciation of the mark, the enactment of the monetary and valorization laws, and, indeed, the whole pertinent history up to the time the agreement was made and the decision rendered. The Insurance Board pronounced the contribution very satisfactory, remarked that larger contributions would not be compatible with the interests of the other insured of appellee and would not be tolerated by the American supervising authority (meaning the Insurance Department of New York) and pointed out that it increased by about seven-fold the amounts the policyholders would receive (Trans. Rec. 480, 484, 492).

Notice was taken of the claims of some of the policyholders that because appellee was a mutual company and there were statements in its policies, prospectuses, and other literature that its surpluses belonged to all of its policyholders, etc., some rule of liability should be applied different from that applicable to non-mutual

companies. These contentions were rejected (Trans. Rec. 486, 487).

The same question was before the German courts and ruled adversely to the policyholders in:

Hardt v. N. Y. Life Ins. Co., supra (Burchard Aff., Trans. Rec. 186; Ex. "P", Trans. Rec. 309, 318).

Protective Ass'n, etc. v. Swiss Life, etc. (Burchard Aff., Trans. Rec. 188; Ex. "R", Trans. Rec. 338, 342, 347, 349; and

Decision by the Surpeme Court of Germany on February 21, 1930, affirming the aforesaid decision (of the Munich Court of Appeals), (Burchard Aff., Trans. Rec. 188, 192; Ex. "S", Trans. Rec. 354, 360); and *Messerschmitt v. N. Y. Life,* Supra (Burchard Aff., Trans. Rec. 182; Ex. "O", Trans. Rec. 298), in which the Court said (Trans. Rec. 307, 308):

> "The plaintiff, who, obviously, himself feels this to be true, has not tried to support his claim by contending that the defendant, at the conclusion of the contract, had promised to him that the insurance money, and/or the redemption amount, would be of stable value, and that the defendant had guaranteed to him that he would not suffer any losses from fluctuation of rates and/or depreciation of currency. The policy which, at least, may be assumed to contain a complete reproduction of the total contract, does not, however, contain anything in support of this (the plaintiff's) view. The defendant's quality of

> a 'pure mutual company' cannot, likewise, be turned to account for this, as it would not in the least alter the fact of the insurance being a mark insurance falling under German law. In the propaganda and prospectus letters, cited by the plaintiff, neither, nothing is said anywhere about a guarantee being given by the defendant with regard to losses caused by fluctuations of rates or depreciation of currencies. These propaganda and prospectus letters have merely the tendency to show off the defendants as an undertaking spread all over the world and being most particularly secure and solvent. In this regard, for the rest reference can be made to the argumentation of the Judge of the First Instance. The annual reports and balance sheets of the defendant, drawn up and published by the defendant in Germany, neither do allow to draw any conclusion with regard to such (alleged) agreement concerning the stability of the insurance money and a guarantee against losses caused by fluctuations of rates and/or depreciation of currencies."

Since the valorization statute and decree went into effect it has been held by all of the German courts passing on the question, including the Supreme Court, that actions cannot be maintained on policies falling within their provisions. This includes the policies involved in this action, as well as all policies involved in the cases pending in the Oregon courts. In other words, outside of valorization, the holder of a German mark policy issued prior to February 14, 1924, may recover only the value of the number of old marks called for by

his contract at the legal rate of conversion of one Reichsmark for one million million of old marks, and his rights under the valorization law and decree are in a fund under the control of the German insurance authorities with which the courts have nothing to do.

We now refer to a few of the many decisions of the German courts to this effect.

In *Schroter v. Alte Gothaer Lebensversicherungsbank,* decided June 8, 1928 (Buchard Aff., Trans. Rec. 180; Ex. "M", Trans. Rec. 283, 289), the Supreme Court said:

> "The judgment appealed against does not show any misconception of the principles of law in so far as it rejects the claim because of the inadmissibility of ordinary proceedings. Under Articles 59, et seq. of the German Revaluation Act, in connection with Article 107 of the Enforcement Ordinance of 29th November, 1925, the revaluation of claims based on life insurance policies takes place in a special procedure to the exclusion of ordinary proceedings in courts.
>
> * * * * * *
>
> "Since, in conformity with the view of the court below, it appears that no judicial proceedings are admissible, the appeal from the decision of the court below is dismissed."

Frensdorff nee Herz v. Swiss Life Assurance Annuity Institute, decided by the Supreme Court of Germany December 13, 1929 (Burchard Aff., Trans. Rec. 181; Ex. "N", Trans. Rec. 291, 292, 293, 297). The

court held that the policy was governed by German law; that the only policies excluded from the application of the valorization law and decree were those issued by foreign insurance companies not subject to the supervision of the German Insurance Board; that it was immaterial that the policy was issued prior to the time the company became subject to supervision; that the only remedies were those under the valorization law and decree, and that no action could be maintained in the courts.

Messerschmitt v. New York Life Insurance Company, decided by the Berlin Court of Appeals March 12, 1930 (Burchard Aff:, Trans. Rec. 182; Ex. "O", Trans. Rec. 298, 305). The Court rejected the contention that a different rule would apply to mutual companies than to non-mutual companies. Among other things the Court said (Trans. Rec. 183-185):

> "The Senate proceeds from the view that the contractual relations of the parties are governed by German law. The contract has been concluded in Germany. The application and the policy are in the German language. The plaintiff was, and is still, a German national, and residing in Germany. The policy was executed, for and in behalf of the defendant, also by its chief representative for Germany. The amount of the insurance money and premiums, both payable in Germany, are expressed in mark-currency; the jurisdiction of the Berlin courts is agreed upon. Considering all this, there can not be the least doubt that the parties had in view — and that it

was their intention — that German law should govern. * * * As to the laws to govern in cases of conflict of laws, in the first place the consensus of intention of the parties, and after that also the place of performance are of decisive importance. Both show in the present case, no doubt, that German law should govern. * * *

"In keeping with this intention of the parties at the conclusion of the contract was also the manner in which the policy has been dealt with thereafter. It was from the beginning kept with the German insurance stock of the defendant; a premium reserve was constituted for it in accordance with the provisions of the pertinent German laws. The policy is undisputedly included in the trustee procedure.

"Having regard of all this, there cannot be the least doubt, when considering the terms and conditions of the insurance contract as laid down in the policy, that the claim concerned herein is a claim arising from a life insurance contract within the meaning of sections 59, et sequ., of the German Revaluation Act and Article 95 of its Enforcement Ordinance respectively, and that this claim arises from a legal relationship entered into prior to February 14, 1924, and that it has for its object the payment of a definite sum expressed in German marks, section 1 of the Revaluation Act and Art. 95 of the Enforcement Ordinance. It is undisputed and a matter of judicial notice that the defendant is a supervised company within the meaning of Article 115 of the Enforcement Ordinance; the German Insurance Department has finally and conclusively de-

cided this to be the case. This decision is binding upon the court.

"Consequently, inasmuch as a revaluation of a mark-claim is involved herein, only revaluation by means of the trustee procedure can take place; such claim must be directed against the trustee; the defendant is not the proper party to be sued therefor. Insofar as the plaintiff in the present proceedings tries particularly to prosecute a claim against defendant based on 'discretionary' revaluation, his claim must be dismissed, because no such claim exists."

See also to the same effect:

Hardt v. New York Life Insurance Co., decided by the Berlin Court of Appeals on March 20, 1930 (Burchard Aff., Trans. Rec. 186; Ex. "P", Trans. Rec. 309, 318, 323).

Marx v. New York Life Insurance Co., decided by the Hessian District Court, January 27, 1930, is to the same effect (Burchard Aff., Trans. Rec. 188; Ex. "Q", Trans. Rec. 324).

Protective Ass'n of Holders of Foreign Insurance Policies v. The Swiss Life, by the Court of Appeals of Munich in its decision of April 15, 1929, in which the question is elaborately discussed (Burchard Aff., Trans. Rec. 188; Ex. "R", Trans. Rec. 338, 345, 352).

The last mentioned decision was affirmed by the Supreme Court of Germany on February 21, 1930

(Burchard Aff., Trans. Rec. 188; Ex. "S", Trans. Rec. 354).

Daunert v. The Guardian Life, decided by the Berlin Court of Appeals July 11, 1928 (Burchard Aff., Trans. Rec. 192; Ex. "T", Trans. Rec. 363, 365).

Other decisions to the same effect are mentioned and reviewed by Dr. Burchard (Trans. Rec. 194, et seq.).

We will conclude this phase of the argument by quoting the following from the affidavit of Dr. Burchard (Trans. Rec. 204):

> "In concluding this portion of my affidavit, I wish to point out that no German court, in any of the hundreds of actions prosecuted before those courts, seeking an adjudication of the claims of the former German policyholders of New York Life Insurance Company, has ever awarded a recovery in Reichsmarks upon the principal or main amount of such insurance; in all those actions, wherever a decision has been rendered, the German courts have in effect, as has been indicated from the decisions I have heretofore cited, relegated the claimant to proceedings under the Revaluation Act, or have suspended the legal proceedings until a decision upon the question of supervision should be rendered by the German Insurance Board, with the obvious intention as indicated in the foregoing decisions, and as has actually been done in some of the aforementioned actions, of thereafter dismissing the action and

relegating the claimant to proceedings under the Revaluation Law, should such decision be to the effect of the decision handed down, that New York Life is a supervised company within the meaning of such laws.

"Unless revalued, of course, such a judgment would obviously be not worth entering, because of the conversion ratio fixed by the Coinage Laws of 1924, of one million millions of old marks for one Reichsmark.

"I wish to reiterate and emphasize that no German court has ever awarded recovery upon the basis that a debt or obligation contracted in or calling for the payment of marks of the old mark currency entitled the creditor to receive or recover in payment Reichsmarks of the currency established by the legislation of August 30, 1924, upon the basis that one mark of the old currency was equal to one Reichsmark, or upon any basis (except under the Revaluation Law) other than that one Reichsmark is equivalent to one million millions of the old mark currency. That such is established German law is confirmed by the decision of the Supreme Court of Germany of June 23, 1927, reported in Volume 118, of the official reports of decisions of the Supreme Court, p. 370, et seq. (See p. 12, et seq., of this affidavit Exhibit "D" hereto attached; also p. 29, et seq., of this affidavit, and Exhibits 'R' and 'S' hereto attached.)

"These are similar to numerous other decisions of the German courts. So established is this construction of the German law that since this said decision of the Supreme Court of June 23, 1927, I do not think any German lawyer could be

found who would present to any German court the contention that, aside from revaluation, under the Revaluation Law and the Enforcement Ordinance or decree of November 29, 1925, and through the administrative machinery there set up, debts or other obligations contracted or expressed in or calling for payment in marks of the old currency entitle the creditor to payment in Reichsmarks except on the basis that one Reichsmark is equivalent to one million million marks of the old currency."

The only matter left unsettled by the earlier decisions of the subordinate German courts was whether or not accumulated dividends on policies were definite sums within the meaning of the valorization law and decree. Of course, if accumulated dividends were not within the valorization laws as to supervised companies, such as the appellee, there could be no valorization of such claims, and the creditor would be entitled to recover only the actual value of his accumulated dividends at the conversion ratio of one million million marks to one Reichsmark. At the time Dr. Burchard made his first affidavit, verified on May 9, 1930, he referred to the fact that the subordinate courts were in disagreement on this question. Shortly thereafter that question came squarely before the Supreme Court of Germany in the case of *Moritz Gross v. New York Life Insurance Company,* decided May 27, 1930, and this decision is discussed in the supplemental affidavit of Dr. Burchard (Trans. Rec. 502), and a copy of the decision is attached as Exhibit "A", (Trans. Rec. 508).

The court held that no distinction should be made between the face or principal sum of the policy and accumulated dividends, and held that both were insurance claims for definite sums within the meaning of the valorization law and decree. Therefore it is now settled by said decision that all claims arising on any of appellee's German policies are exclusively subject to the valorization law and decree and to the administrative jurisdiction of the German insurance authorities.

It is respectfully submitted that the judgment from which the appeal is taken should be affirmed.

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No. 6405

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HENRY HEINE,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellants' Reply Brief

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,
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ARGUMENT

This reply brief is necessarily in anticipation of the contentions that defendant intends to advance in its brief. The only guide we have to that intention is the fact that defendant filed in this Court a praecipe demanding the printing, as a part of the Transcript of Record, of a voluminous mass of affidavits, which were filed in the lower court ostensibly as bearing on the proper exercise of a discretion, that the court was assumed to have, as to whether it would retain jurisdiction. This additional matter is entirely immaterial and irrelevant to the sole and only question raised by the appeal. Inasmuch as respondent must have some purpose in calling for the printing of such additional matter, we anticipate that the purpose is to argue to this Court that the lower court had no jurisdiction of the subject matter, notwithstanding that respondent conceded in the lower court that the district court did have such jurisdiction

(Trans. Rec., p. 562.)

Acting upon that anticipation we will now undertake a reply to what we expect counsel will contend.

The position and contention of respondent in the lower court was that, even though jurisdiction of the subject matter existed, the court had a discretion as to whether or not it would exercise that jurisdiction, and this voluminous mass of affidavits was filed for the avowed purpose of guiding and persuading the exercise of that discretion so that the cause be dismissed. The lower court found and decided that it did have jurisdiction of the subject matter, but also

further decided that it possessed a discretion as to whether it would exercise that jurisdiction and then exercised the discretion by dismissing the cause.

The sole and only question raised by the appellant here is whether the said discretion existed, and appellant contends that no such discretion was vested in the Court, and that its decision that it had jurisdiction necessitated a retention of the case for trial on the merits.

The judgment of dismissal was pursuant to a motion to dismiss, supported by affidavits, although the matter contained in the affidavits had been pleaded as a defense in the answer.

The motion to dismiss, insofar as it is based on a want of jurisdiction, is founded upon facts which do not appear upon the faces of the petition for removal or of the complaint.

In such cases the general rule is that a challenge of the jurisdiction cannot be made by motion, but must be raised by plea. It is only when a want of jurisdiction affirmatively appears on the face of the complaint that it can be raised by motion.

Desert King Co. vs. Wedekind, 110 Fed. 873, 877.

Smith vs. Kernochan, 7 How. 198, 216.

Wickliffe vs. Owings, 17 How. 47.

Eberly vs. Moore, 24 How. 147.

Hartog vs. Memory, 116 U. S. 588, 6 Sup. Ct. 521.

Ry. Co. vs. Pinkney, 149 U. S. 194, 199, 13 Sup. Ct. 859.

This rule necessarily results from the requirement that the facts showing a want of jurisdiction must be found by the Court to a legal certainty.

Wetmore vs. Rymer, 169 U. S. 118, 18 Sup. Ct. 294.

If the facts, showing the want of jurisdiction of the subject matter, appear on the face of the complaint they are, of course, binding on plaintiff and the court is thereby advised thereof to a legal certainty. But, if the facts, depended on to show a want of jurisdiction of the subject matter, do not appear on the face of the complaint, they should be presented by a formal plea upon which issue may be joined and be determined in the regular way, so that all parties may have the benefit of cross-examination. In that way the legal certainty required by the law may be obtained, which is not true of a motion and ex parte affidavits.

These facts, upon which respondent relies to show a want of jurisdiction, are pleaded by a formal plea in the answer. They are put in issue by the reply. Appellant is entitled to have that issue determined by a jury. The issue should be submitted to the jury separately and independently of the issues on the merits.

Farmington vs. Pillsbury, 114 U. S. 138, 5 Sup. Ct. 807.

Hartog vs. Memory, 116 U. S. 588, 6 Sup. Ct. 521.

Terry vs. Davy, 107 Fed. 50.

The better practice is, when a plaintiff's case shows a bona fide claim within the jurisdiction of the court, with a reasonable plausibility in support thereof, to pass the question of jurisdiction of the subject matter until the cause is considered on its merits on formal pleadings.

Millinger vs. Hartupee, 6 Wall. 258.

Douglas vs. Wallace, 161 U. S. 348, 16 Sup. Ct. 485.

City Ry. Co. vs. Citizens Ry. Co., 166 U. S. 557, 563, 17 Sup. Ct. 653, 655.

York County Sav. Bank vs. Abbott, 131 Fed. 980.

And such is the original procedure adopted by respondent. It made a formal plea in its answer tendering issue as to the alleged facts on which the pretended want of jurisdiction of the subject matter is predicated. Issue was joined hereon by the reply and a trial of the issue was expected to be had by appellant in the regular way.

But respondent has taken many inconsistent positions. First, it filed and verified a petition for removal wherein it alleged that the lower court *had* jurisdiction of the subject matter. Next it filed an answer wherein it raises the objection that the lower court *had no* jurisdiction thereof, by alleging facts which it asserts deprived the court of such jurisdiction. And then, when those facts were denied and put in issue by the reply, respondent filed a motion to dismiss and presented a number of ex parte affidavits

in support thereof, which affidavits undertake to establish the very facts which are in issue on the said pleadings. Thus, it can be seen, that after raising the question by formal pleadings upon which issues of fact are made, which is the proper and regular procedure, respondent then attempts to establish these facts in an ex parte proceeding by affidavits, so that appellant is deprived, not only of his right of cross examination, but also of his right to have the issue determined by a jury.

We know of no legal precedent for any such procedure.

Certainly there is no such practice or procedure known to the law of the State of Oregon; and it is by that law and the practice of the courts of Oregon that the question of jurisdiction of the subject matter is to be determined, there being no federal question involved. When jurisdiction of the federal court depends solely upon diversity of citizenship, or by virtue of alienage on one side and citizenship on the other, a determination of the essential elements of jurisdiction required by Sections 41 and 71 of Title 28 U. S. C. A., is made according to the rules and practice of the federal court. But when the question is one of jurisdiction of the subject matter only, and there is no federal question involved, then the state law applies and the practice of the state courts prevails.

That the law applies see

25 C. J. 829, Sec. 163.

That the state practice prevails, see

Crowley vs. N. P. R. R., 159 U. S. 569, 16 S. Ct. 127.
Phelps vs. Oaks, 117 U. S. 236, 6 S. Ct. 714.
West vs. Smith, 101 U. S. 263.

It has been said that on removal of a cause to the federal court, the party removing it is estopped and will not be heard to question the jurisdiction of the federal court of the subject matter, but may challenge such jurisdiction of the state court only.

Tootle vs. Coleman, 107 Fed. 41.

The point is that the federal court must enforce such rights as the plaintiff has under the state law. And if the state court has jurisdiction of the subject matter, it cannot be deprived thereof by a removal of the cause, but the federal court must also take jurisdiction thereof.

Note 54, Sec. 81, Title 28, U. S. C. A., page 666.
Texas, etc., Co., vs. Humble, 181 U. S. 57, 21 S. C. 526, 528.

The case last cited well illustrates the point. Under a state statute a married woman was entitled to sue for damages, in her own name, for personal injuries. Such a woman began such an action in her own name in a state court. It was removed to the federal court, and there a motion to dismiss was filed upon the ground of a want of jurisdiction of the subject matter in that the husband was not the plaintiff. The Supreme Court held that jurisdiction of the subject matter was governed solely by the state law.

As we have repeatedly said, the jurisdiction of the state court is well settled. In fact, it was conceded in the lower court by respondent. (Page 562, T. of Rec.) And, as previously stated, the Oregon Supreme Court and this court have both sustained the jurisdiction of the state court.

A challenge made now to the jurisdiction of the subject matter is, therefore, necessarily a contention that the *state court* had no such jurisdiction. And, inasmuch as the challenge depends upon facts not appearing on the record, it cannot be raised by motion, but must be presented and tried by and upon the pleadings.

It is admitted here by the verified petition for removal filed by respondents that the elements of federal jurisdiction exist, and therefore it is only a matter of the jurisdiction of the state court of the subject matter which is now sought to be raised, after the same was admitted and conceded in the lower court. The right of the state court to entertain the action must, as we have said, be determined by state law and according to the practice of the state courts.

The court of last resort in Oregon has sustained jurisdiction of the subject matter in State ex rel vs. Tazwell, 125 Or. 528. And if it had not, this court has done so in the case of Denver Co. vs. Roller, 100 Fed. 738, where a California statute identical with the Oregon statute was held to confer jurisdiction on the California courts of a transitory action which arose outside of California and against a non-resident of California.

When the cause was removed from the state court, that court had jurisdiction of the subject matter thereof. It follows that any matter presented afterwards in the federal court to challenge that jurisdiction, is a matter of defense and cannot be raised by motion, but only by proper pleadings.

The grounds upon which the alleged want of jurisdiction is predicated are these:

First: It is said that by the law of Germany and by the policies, exclusive jurisdiction of any action upon such policies is vested in the German courts.

Second: It is said that the policies are German contracts and the rights, duties and liabilities thereunder are governed exclusively by German law; and that the German law, known as the Valorization Act, has required all insurance companies to turn over all their assets to certain government officials who will administer them and give to each policyholder his proper proportion thereof; and a tribunal has been created to carry out the provisions of that act. It is a sort of bankruptcy proceeding applicable only to insurance companies. The contention of respondent is that resort to the said German tribunal is the only remedy open to plaintiff, and therefore the district court has no jurisdiction of the case.

And it is further contended that by a German law, enacted since the policies were issued, payments of debts due in German marks, may be made at a certain designated rate, and that appellant's action is not based on such rate of recovery.

In each and every of these premises the respondent is entirely wrong.

The first claim—that of the exclusive jurisdiction of the German courts, was taken to the supreme court of the state of Oregon, and there decided adversely to respondent's contention.

State ex rel vs. Tazwell, 125 Ore. 528.

Moreover, the United States supreme court as well as other federal courts, have repeatedly held that laws of states or foreign countries providing that a particular remedy is exclusive or that relief can only be obtained in some designated court, or agreements by parties to that effect, are not binding upon the federal courts, who are vested with their jurisdiction by the United States Constitution and by acts of congress, and cannot be deprived thereof by foreign laws or agreements of parties.

Madisonside Traction Co. vs. St. Bernard Co., 196 U. S. 239, 252, 253.

Grover vs. Merritt Co., 7 Fed. (2d) 917.

Insurance Co. vs. Morse, 20 Wall (87 U. S.) 445.

Gough vs. Hamburg, etc., 158 Fed. 174.

Mutual, etc., Association vs. Cleveland Mills, 82 Fed. 508.

Furthermore, this is not an action upon the policies at all, but is an action for damages for the repudiation and wrongful cancellation of the insurance contracts by respondent.

Cooley's Briefs on Insurance (2d Ed.), Vol. 5, p. 4694.

Lovell vs. St. Louis Mut. Ins. Co., 111 U. S. 264, 4 S. Ct. 390.

The very foundation and basis of the second claim, i. e., that the policies are German contracts, governed and controlled by German law, is hopelessly erroneous. The contracts are New York contracts.

It will be noticed that the complaint alleges that respondent is a mutual life insurance company, and that the policies are mutual contracts (p. 88, Trans. Rec.). And this is admitted in the answer, there being no denial thereof. (Par. 1, p. 8, Trans. Rec.) The law of the state of New York forbids such companies from discriminating between its policyholders of the same class. And this law is pleaded in the reply. (Par. III of the further and separate reply to the third separate answer and defense, pp. 132 and 145, Trans. Rec.)

In the affidavit of the vice-president of the respondent (which is not an affidavit at all, but an argument on the merits), the following statement of facts is made, viz:

> "The defendant is a purely mutual company. It has no stockholders and no capital funds and *all its assets and earnings are equitably the property of the insured.* Since a mutual insurance company has no assets which do not belong to its policy holders, it makes no profits in relation to them. Its sole function is to *provide them with the protection defined by the terms of their policies* at the actual cost thereof. * * * * *Under the principles of mutuality, as accepted and ap-*

plied in the insurance business and by insurance authorities throughout the world, it is recognized that a mutual insurance company is essentially a trustee for the various groups of its policy holders and that it should deal equally and fairly between them and should have no favorites among them." (P. 468, Trans. Rec.)

These considerations bring the case squarely within the principles of two recent decisions of the United States supreme court, wherein it is held that by reason of the necessity of preserving the principle of mutuality, and to insure equal and fair dealing with the members and policy holders, and prevent discriminations, the contract between the member or policy holder and the insurance company must be construed and interpreted by one law, and the rights, duties and liabilities thereunder be measured by a single standard, and that law and standard is held to be the law of the state of the creation of the insurance company.

Supreme Council vs. Green, 237 U. S. 531, 35 Sup. Ct. 724.

Modern Woodmen vs. Mixer, 267 U. S. 544, 45 Sup. Ct. 389.

In other words, it is impossible to preserve the mutual idea, or accord fair and equal treatment among all policy holders, or prevent discriminations, if the mutual insurance contract is to be construed in England by English law, in France by French law, in Germany by German law, etc.; and the necessity of applying a single standard has impelled the Supreme Court to adopt the law of the place of the insurance

company's creation as the standard by which the rights, duties and liabilities of the parties are to be measured.

Justice Holmes very clearly states the doctrine in the following language:

> "The indivisable unity between the members of a corporation of this kind in respect to the fund from which their rights are to be enforced, and the consequence that their rights must be determined by a single law, is elaborated in Supreme Council vs. Green, 237 U. S. 531, 542.— The act of becoming a member is something more than a contract—it is entering into a complex and abiding relation—and as marriage looks to domicil, membership looks to and must be governed by the law of the state granting the incorporation."
>
> Woodmen vs. Mixer, 267 U. S. 544.

While it is true that these two decisions concern fraternal insurance, yet the principle involved is precisely the same as that involved here. Mr. Buckner has explained that the entire undivided fund, consisting of *all* the assets of respondent, is a trust fund for the security of *all policies;* most of the policies so declare on their faces; the principles of mutuality and of equal and fair treatment must be preserved and discriminations prevented. It is, therefore, apparent that the same considerations which impelled the decisions in these two cases are present in this one, so that those decisions rule this case.

It follows that it is the law of the State of New York and not that of Germany which must be looked to for a determination of the rights, duties and liabilities of the parties.

As stated by Mr. Buckner, the respondent's vice-president, in his affidavit above quoted, all the assets of the company constitute a trust fund in the hands of respondent for the enforcement of the policies issued by it. This also appears expressly in most of the policies issued. And all policyholders—German as well as those of other nationalities—are entitled to fair and equal treatment without discrimination.

The events which have occurred are pleaded and set forth in the answer of the respondent, and they amount briefly to this: The respondent, which has a surplus in this country alone of over $400,000,000.00 (paragraph VI, page 138, Transcript of Record), organized in Germany a subsidiary insurance company known as "Kronos," to which company respondent turned over and transferred all its assets then located in Germany, *but none of its other assets.* Kronos and respondent on December 31, 1921, entered into an agreement whereby, in consideration of such transfer of the German assets, said Kronos undertook and agreed to perform all of respondent's German policies. This is alleged to have been done with the consent of the insured and a novation of the policy is claimed to have occurred, whereby respondent claims to have been released from all liability under the policy. (Defense of Novation, pp. 41 to 46 Trans. Rec. Plea in abatement in re Valorization Law, pp. 46 to 51, Trans. Rec.) Appellant denies any consent to such transaction and denies the alleged novation and discharge from liability; and also denies the plea in abatement. (Denial of Novation, Pars. IX, X, XI and XII of Reply, pp. 123-124 Trans. Rec. Denial

of Abatement, Pars. XIII and XIV of Reply, p. 124 Trans. Rec.). In conformity with the alleged Valorization Act said Kronos has turned over to the proper German officials all the assets *it had received* from respondent. And the contention now made is that because of those transactions, plaintiff's only remedy is against the said German assets so turned in by Kronos.

What has become of the duty of respondent to treat all its policyholders fairly and equally? What of the German policyholders' rights to enforce their policies against *all* the assets of respondent? What becomes of the functions, of which Buckner speaks in his affidavit, of the company to provide all policyholders with the protection defined by the terms of their policies?

Manifestly the scheme and plan adopted and carried out, as detailed in the answer, had for its aim and purpose the withdrawing from the German policyholders their right and interest in the trust funds consisting of *all* the assets of the company, and compelling them to resort solely to a small and inadequate part of it, viz., the German assets, which had been transferred to Kronos and then by it turned over to the valorization officials.

This elaborate scheme to violate its duty of treating all policyholders equally and to deprive the German policyholders of the security guaranteed them by their contracts, viz.: *all* the assets of the company, is no stronger than its weakest link i. e., the alleged novation contract. If that novation actually occurred

with the insured's consent, then respondent is relieved of liability. But otherwise respondent remains bound by its contract, and the compliance by Kronos with the alleged Valorization Act cannot avail respondent in any way or compel policyholders to proceed against the assets of Kronos, or deprive them of the right of enforcing their claims against the security of all the assets of respondent.

Whether or not this novation actually occurred is an issue on the merits of the case to be determined by a jury, and whether the Valorization Law actually exists, is an issue on the pleadings.

It must be remembered that the law of the State of New York goes with and is binding upon respondent wherever it transacts business. If that law prohibits any act of respondent, it cannot evade the force and effect of it in Germany any more than it could in New York.

Fletcher, Cyc. Corp., Vol. 8, pp. 9327-9332.
Canada So. R. R. vs. Gebhard, 109 U. S. 527.
McClement vs. Sup. Ct., 222 N. Y. 480, 119 N. E. 102.

Reducing counsel's contention to its final basis, it amounts simply to this: that the insured are deprived by German law from enforcing their policies against the assets of respondent located in the United States. That these assets are a trust fund out of which all policyholders are entitled to enforce their claims, is admitted in the affidavit of respondent's vice-president (p. 468 Trans. Rec.). Now, if we go to Germany

and there begin an action to enforce our claim *against the fund which is located in the United States,* the German courts will very properly say to us that they have no power to aid us, and that if we wish to proceed against the American assets we must go to the United States to do so, because there is where the fund is located. It is only against the assets in Germany that the German courts can proceed. The claim, therefore, that only German courts may enforce our claims, is equivalent to contending that in some way we have lost the security, guaranteed us by the policies, of the entire trust fund held by respondent. And yet the policies themselves give us an interest in *all* the earnings and profits of the respondent and guarantee us the security of all its assets, and this, Mr. Buckner says, is a fact.

Manifestly, we cannot be deprived of our interest in respondent's profits, or of the security of *all* its assets unless we have by contract agreed to that effect. Respondent, in its answer, pleads that we have so agreed. We have denied this. So the matter which is sought to be raised here is a matter of the merits of the case. And this cannot be determined here by this court upon affidavits.

It is very certain that German law has no power to compel respondent to transfer all its assets to the valorization officials; it is also very certain that respondent has not done so; nor does it intend to do so. Its contention is that this alleged German law binds us, but that it does not bind respondent; that we must accept only our proportion of what respondent has

turned in pursuant to that law, but that respondent need turn in only what it chooses. And that is said to constitute mutuality and fair and equal treatment.

The fact is German law has nothing to do with the matter. It cannot enforce compliance by respondent; it cannot construe and define the mutual rights and obligations of the parties; it cannot reach the trust fund in America and bring about its proper distribution. There is but one law which can do that and that is the law of New York. It is a matter of common sense that to enforce a claim upon a trust fund, resort must be had to the courts of the place where the fund is located.

It can, thus, be readily seen that the entire structure of respondent's claim of a want of jurisdiction is predicated upon the determination of the merits of the action. Whether or not there was a novation of the policies is the gist of the matter. If there was then, because of such novation and insured's consent thereto, the sole and only fund to which plaintiff could resort would be the German assets in the hands of the German valorization officials—and that only because the insured consented to the novation and accepted the promise of Kronos and its assets for the fulfilment of its contract, in lieu and stead of respondent's. But plaintiff has denied such consent, and has denied the acceptance of Kronos and the release of respondent, and has denied the novation; and has alleged that the attempted novation and the express repudiation of the policies by respondent, based on said alleged novation, is a wrongful cancellation of

his contract, on account of which he is entitled to damages. (Pars. III and VI of each cause of action, pp. 89-91-94 Trans. Rec.) These issues manifestly must be tried by a jury and cannot be summarily disposed of on ex parte showings by affidavit.

If the fact be found to be that appellant did not consent to the novation, and did not accept Kronos and its assets for the fulfillment of his contract in the place and stead of respondent, then the fund turned into the hands of the valorization officials *does not* constitute the *whole,* or even a substantial portion of the funds out of which appellant is entitled to enforce his policies. And the express repudiation of the contracts by respondent and its refusal to be bound thereby, gives appellant his cause of action against respondent for damages enforcible out of any assets of respondent wherever they may be found. It is alleged that respondent has assets in Oregon. (See Reply, pp. 130, 132, 137 and 138-139 Trans. Recd.).

It is, therefore, not a jurisdictional question at all which respondent seeks to argue, but a question of the merits. For it depends entirely upon whether there was a novation of the policies, or whether such attempted novation and respondent's refusal to be bound by the policies constitutes a wrongful cancellation and repudiation of the contracts. If there was a novation, we concede we have no case. If, on the other hand, there was a wrongful cancellation and repudiation of the policies by respondent, we have an action for damages because thereof. But this issue,

made by the pleadings, cannot be determined on this appeal, but constitutes the very merits of the action.

We shall pursue this subject no further, for we do not believe it is here for consideration. It is a matter to be determined upon a trial of the formal issues presented by the pleadings. We have thus briefly alluded to it to show that counsel are wrong in their premises and that the decision of the lower court, and respondent's admission in the lower court, that said court had jurisdiction of the subject matter, are correct.

It is the purpose of this brief to demonstrate that the question as to whether or not the lower court had jurisdiction of the subject matter is not before this court for consideration.

We have undertaken to show that neither in the court below nor in this court has that question been so presented that the court can possibly arrive at a legal certainty of the alleged facts which respondent contends deprives the court of jurisdiction of the subject matter. The procedure adopted to present the question was a proper one by a formal pleading tendering the issue. The issue was made. But no trial thereof was had. Instead, a motion to dismiss was made, supported by affidavits, which were understood by everyone to bear only on the proposition as to how the court should exercise its discretion, if a discretion existed.

Inasmuch as those affidavits and the additional parts of the record, ordered by respondent, can have no possible bearing upon the question raised on the

appeal, viz., whether or not the lower court had any discretion in the matter, it becomes apparent the respondent proposes to use them in some other way. And we anticipate that an attempt will be made to raise and present, on these affidavits, the very question which is the subject of the formal pleadings and upon which there must be a trial before the court can be advised to a legal certainty that the facts alleged and denied are true.

By demanding the printing of this additional and unnecessary record (p. 581-584) Trans. Rec., and p. 238 of Trans. Rec. in case of Herrmann v. N. Y. L. Ins. Co., No. 6406) respondent has compelled appellant to pay in excess of $600.00 in this case—and $210.00 in said Herrmann case, No. 6406, unnecessarily. And it is respectfully requested that this court make a proper order concerning that matter whereby respondent be compelled to pay to the clerk of this court for the benefit of appellant the sums appellant has been compelled to pay for the printing of such immaterial and unnecessary record.

It is respectfully submitted that the judgment of the district court be reversed and the cause be remanded for trial on the merits.

Respectfully submited,

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Appellant.

No. 6406

United States

Circuit Court of Appeals

For the Ninth Circuit.

PAUL HERRMANN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 6406

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. E. B. SEABROOK, Concord Building, Portland, Oregon, and Mr. C. T. HAAS, Pacific Building, Portland, Oregon,
For the Appellant.

HUNTINGTON, WILSON & HUNTINGTON, Porter Building, Portland, Oregon, and CLARK & CLARK, Yeon Building, Portland, Oregon,
For the Appellee.

In the District Court of the United States for the District of Oregon.

No. L.–10,535.

PAUL HERRMANN,
Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant.

CITATION ON APPEAL.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

To the New York Life Insurance Company, a Corporation, Defendant, Above Named, and to Messrs. Clark and Clark, and to Huntington, Wilson & Huntington, Your Attorneys Herein, GREETING:

WHEREAS the plaintiff above named has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States for the District of Oregon, in your favor, on December 1, 1930, and has given the security required by law,

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said judgment should not be reversed or corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 6th day of February, in the year of our Lord one thousand nine hundred and thirty-one.

JOHN H. McNARY,
Judge.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely the legal service by copy of the within and foregoing citation on appeal is hereby admitted at Portland, Oregon, this 6th day of February, 1931.

CLARK & CLARK,
Attorneys for Defendant Above Named.

[Endorsed]: Filed Feb. 6, 1931. [1*]

In the District Court of the United States for the District of Oregon.

November Term, 1928.

BE IT REMEMBERED, that on the 4th day of February, 1929, there was duly filed in the District Court of the United States for the District of Oregon, a transcript of record on removal from the Circuit Court of the State of Oregon for Multnomah County, the Petition for Removal, Order for Removal, and Certificate of the Clerk, contained therein, being in words and figures as follows, to wit: [2]

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*Page-number appearing at the foot of page of original certified Transcript of Record.

In the Circuit Court of the State of Oregon, for Multnomah County.

No. N.–1529.

PAUL HERRMANN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

PETITION FOR REMOVAL.

To the Honorable Circuit Court of the State of Oregon for Multnomah County:

Your petitioner, New York Life Insurance Company, a corporation, the above-named defendant, respectfully shows to this Honorable Court:

I.

That this is an action at law brought by said plaintiff against this defendant to recover upwards of $22,000.00, exclusive of interest and costs and that the matter in dispute and the amount in controversy exceeds the sum of $3,000.00, exclusive of interest and costs. That there is a controversy between the parties to this action, defendant controverting and denying each and every part of the cause of action set up in the complaint in said action, and said action was duly filed and commenced and is now pending in this court; that this cause is one of a civil nature, of which the District

Courts of the United States have original jurisdiction.

II.

At the time of the commencement of this action your petitioner, the above-named defendant, was and still is a corporation, duly organized and existing under and by virtue of the laws of the State of New York and a citizen and resident of said state. At the time of the commencement of this action the plaintiff was and still is a citizen, subject and resident of the Republic of Germany and a nonresident of the State of Oregon. [3]

III.

That the time within which the defendant is required to answer by the laws of Oregon has not yet expired, service of summons herein having been made upon the defendant in Multnomah County, Oregon, on the 26th day of December, 1928.

IV.

Your petitioner herewith offers a good and sufficient bond and surety for its entering in the District Court of the United States for the District of Oregon, within thirty days from the date of the filing of this petition, a certified copy of the record in this action and for paying all costs and disbursements that may be awarded by said District Court of the United States if said court shall hold that this action was wrongfully or improperly removed.

WHEREFORE, your petitioner prays that this Honorable Court proceed no further herein except

to make the proper and usual order of removal, as required by law, and to accept the said bond and surety and cause the record herein and this action to be removed to the District Court of the United States for the District of Oregon.

NEW YORK LIFE INSURANCE COMPANY.

By R. A. DURHAM,
Its Attorney-in-fact for Oregon,
Petitioner.

CLARK & CLARK,
HUNTINGTON, WILSON, HUNTINGTON,
Attorneys for Petitioners. [4]

State of Oregon,
County of Multnomah,—ss.

R. A. Durham, being first duly sworn, deposes and says: That I am the attorney-in-fact for Oregon for the above-named petitioner; that the foregoing petition is true, to my own knowledge, except as to matters therein stated on information and belief and as to those matters I believe it to be true.

R. A. DURHAM.

Subscribed and sworn to before me this 3d day of January, 1929.

[Notarial Seal]

WALTER M. HUNTINGTON,
Notary Public for Oregon.

My commission expires Mar. 4, 1932.

State of Oregon,
County of Multnomah,—ss.

On this 3d day of January, 1929, in said county and state, before me, a notary public within and for said county and state personally appeared R. A. Durham, to me well known to be the individual who executed the foregoing petition for and in behalf of the said defendant and acknowledged to me that he executed the same.

[Notarial Seal]

WALTER M. HUNTINGTON,
Notary Public for Oregon.

My commission expires March 4, 1932.

Due and legal service of the foregoing petition for removal upon me at Portland, Oregon, this 3d day of January, 1929, is hereby acknowledged.

PETER A. SCHWABE,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 5, 1929. [5]

BE IT REMEMBERED, that at a regular term of the Circuit Court of the State of Oregon, for the county of Multnomah, begun and held at the county courthouse in the city of Portland, in said county and state on Monday, the 3d day of December, A. D. 1928, the same being the first Monday in said month, at the time fixed by law for holding a regular term of said court. Present, Hons. JACOB KANZLER, ROBERT G. MORROW, ROBERT TUCKER,

JOHN H. STEVENSON, LOUIS P. HEWITT, WALTER H. EVANS, GEORGE TAZWELL and W. A. EKWALL, Judges.

Whereupon, on this Saturday, the 5th day of January, A. D. 1929, the same being the 28th judicial day of said term of said court, among other proceedings the following was had to wit:

[Title of Court and Cause—Cause No. N.–1529.]

ORDER FOR REMOVAL.

(Jan. 5, 1929.)

This defendant having presented to this Court a sufficient petition for removal of this cause to the District Court of the United States for the District of Oregon and a bond with sufficient surety upon removal;

And it appearing that the plaintiff has been given due and timely notice of the time and place for a hearing upon said petition,—

IT IS ORDERED that said petition is sufficient in [6] substance and form and is hereby allowed, that the bond for removal is accepted and approved, and this Court proceed no further in this cause and that it be and is hereby removed to the District Court of the United States for the District of Oregon.

Dated this 5th day of January, 1929.

JACOB KANZLER,
Judge. [7]

State of Oregon,
County of Multnomah,—ss.

I, A. A. Bailey, County Clerk and *Ex-officio* Clerk of the Circuit Court of the State of Oregon in and for the county of Multnomah, do hereby certify that the foregoing copy of complaint, summons and return of service, notice of Removal and proof of service, bond on removal and proof of service, and order of removal, constitute all the records and proceedings had in a cause entitled Paul Herrmann, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant, have been by me compared with the originals and that they are true and correct transcripts therefrom and from the whole of such originals as the same appear of record and on file in my office and in my care and custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 10th day of January, A. D. 1929.

[Seal of Court] A. A. BAILEY,
County Clerk.
By C. S. Stowe,
Deputy.

Transcript of Record. Filed February 4, 1929.
[8]

AND AFTERWARDS, to wit, on the 19th day of May, 1930, there was duly filed in said court a second amended complaint, in words and figures as follows, to wit: [9]

In the District Court of the United States, for the District of Oregon.

No. L.–10,535.

PAUL HERRMANN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

SECOND AMENDED COMPLAINT.

Comes now the plaintiff and for his second amended complaint and for cause of action against defendant, alleges the following facts:

I.

That at all times hereinafter mentioned, the defendant, New York Life Insurance Company, was and now is a mutual life insurance corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of Oregon as a foreign corporation in compliance with the laws of the State of Oregon.

That the business of the defendant corporation, among other things, is and was during all times

herein mentioned the authorized issuance of life insurance and endowment policies upon the mutual insurance plan in the State of Oregon, the United States, the former Empire of Germany, now the Republic of Germany, and in other countries.

II.

That on or about February 25th, 1905, upon the application of one Ludwig Schnell, hereinafter called the insured, to the defendant corporation and in consideration of the payment by the said insured of annual premium of 522 marks, legal tender of Germany, and in further consideration of a similar premium to be paid annually on or before December 31st of each succeeding year during the continuance of the policy, for a stated period of twenty (20) years, the defendant made, executed, sealed and delivered to said insured its policy of life insurance and endowment contract numbered 1554478, substantially in form and tenor as in Exhibit "A" attached to the answer of defendant on file herein.

III.

In said policy of insurance it is provided, among other things as follows:

> "If however, the insured survives the maturity of the insurance, that is the 31st day of December Nineteen Hundred and Twenty-Four, [10] the amount of 9000 Marks Deutsche Reischswahrung will be paid to the insured or his legal successors and this policy at the same time will cease and determine."

"The present policy is issued, as specified on the first page, with annual participation in the profits of the Company. The said profits are distributed on the anniversary of the policy and may

A. Be withdrawn in cash; or,

B. Be applied to increase the original amount of insurance."

Said policy also contains provisions providing for the ascertainment, calculation and distribution of the profits of the Company to the holder of said policy wherein all the earnings of the company from business wherever transacted and all profit participating policies wherever issued and wherever the holders thereof reside and wherever the same are payable, are considered and figured into the calculation.

IV.

Prior to December 31, 1924, plaintiff's assignor said Ludwig Schnell, duly performed all and singular the conditions precedent on his part to be done and performed and on December 31, 1924, was alive and is now alive.

V.

Prior to February 7, 1923, said insured had elected to withdraw the profits distributed on said policy in cash and have them applied in payment of the premiums due on said policy, and all profits accrued and payable prior to February 7, 1923, were paid. But neither the profits of defendant for the year 1922, payable February 7, 1923, nor the profits for the year 1923, payable February 7,

1924, nor the profits for the year 1924, payable February 7, 1925, were ever ascertained, calculated or distributed or paid. And on or about February 8, 1925, said Ludwig Schnell demanded of defendant that it pay said endowment of 9,000 marks, and ascertain and distribute the profits for the years 1922, 1923, and 1924, but defendant then refused and ever since has refused to do so; and defendant then repudiated said insurance and endowment policy and contract and stated that it was not liable thereunder and that it would not be bound by or perform the same or any part thereof; and [11] defendant never has paid any part of said endowment fund nor the profits for the years 1922, 1923 and 1924.

VI.

During the years of 1922, 1923 and 1924 defendant was engaged in its said business not only in Germany, but also in other countries of the world and in the United States of America and earned large profits, a part of which pursuant to the terms of said policy were to be allotted and distributed to the insured, which profits were earned and accumulated in American dollars, and invested in American dollars and have always been kept and calculated and accounted in books of accounts and records written in the English language and kept in the city of New York, State of New York, in the United States of America, and have always been so kept, recorded, calculated and accounted in the terms and values or American dollars. A large part of said profits have been and are now

kept by defendant in American dollars in the States of New York and of Oregon.

VII.

Plaintiff alleges that the distributive share of said insured in the profits of the defendant for the year 1922 would have been, if defendant had performed its contract, the sum of $74.90, and for the year 1923, would have been the sum of $83.50, and for the year 1924 would have been the sum of $95.40, no part of which has been paid.

VIII.

The exchange value of one German mark, legal tender of Germany the medium of payment of the endowment fund specified in said policy, on December 31, 1924, and at all times thereafter was the sum of Twenty-three and Eighty-five Hundredths Cents ($0.2385).

IX.

The amount of the death benefit and the endowment fund specified in said policy and the premium fixed by said policy were carried at all times on the books and in the accounts of defendant in the city of New York, State of New York, in the United States of America, in American dollars at the exchange rate of one mark, legal tender of Germany, being equal and equivalent in value to Twenty-three and Eighty-five One Hundredths Cents ($0.2385). [12]

X.

By reason of the facts aforesaid and the repudiation of said policy of insurance and endowment contract by defendant and its failure to pay said

endowment fund and said profits said insured and this plaintiff have been and are damaged in full sum of $2,146.50, and the further sum of $74.90, and the further sum of $83.50 and the further sum of $95.40, together with interest thereon at the rate of 6% per annum from the date of filing this complaint, no part of which has been paid.

XI.

After February 8, 1925, and after the said repudiation of said policy by defendant, aforesaid, and prior to the commencement of this action, said insured for a valuable consideration assigned and transferred to plaintiff all his rights and interest in and to said policy of insurance and said endowment fund and said profits, and also all his rights to and demands for damages by reason of defendants said repudiation of said policy and its refusal to pay said endowment fund and to distribute and pay said profits, and plaintiff is now the owner and holder thereof.

XII.

By reason of the facts aforesaid plaintiff has been damaged specially in the further sum of $350.00 which sum plaintiff alleges is a reasonable sum to be allowed as attorney's fees in this action, for the payment of which to his attorney appearing in this action plaintiff has necessarily and because of defendant's said wrongful acts incurred a liability.

And for a second further and separate cause of action against the defendant, plaintiff complains and alleges as follows:

I.

That at all times hereinafter mentioned, the defendant, New York Life Insurance Company, was and now is a mutual life insurance corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of Oregon as a foreign corporation in compliance with the laws of the State of Oregon.

That the business of the defendant corporation, among other things, is and was during all times herein mentioned the authorized issuance of life insurance and endowment policies upon the mutual insurance plan [13] in the State of Oregon, the United States, the former Empire of Germany, now the Republic of Germany, and in other countries.

II.

That on or about July 12th, 1902, upon the application of one Martin Loeb, hereinafter called the insured, to the defendant corporation and in consideration of the payment by the said insured of an annual premium of 1,074.60 marks, legal tender of Germany, and in further consideration of a similar premium to be paid annually on or before July 12, of each succeeding year during the continuance of the policy, for a stated period of twenty (20) years, the defendant made, executed and sealed and delivered to said insured its policy of life insurance and endowment contract numbered 1501182, a substantial copy of which is attached to the answer and marked Exhibit "C."

III.

That in and by said policy and contract it is provided as follows:

"Or, should the insured still be living at the expiration of the insurance period, namely on July 12, 1922, the amount of M.20000 Deutsche Reischswahrung will then be paid to the insured, or his legal representative and, at the same time, the policy shall cease and determine."

"The present policy is issued with accumulation of profits during the period of 20 years, ending with the 12th day of July, 1922, should the insured be alive at noon of said day and all premiums have been paid in full, this Company will allot to the insured or his legal successor, the profits and this policy, also grants the right to choose from the following four methods of settlement:

"(1) in cash, or

"(2) in the shape of a life annuity, or

"(3) in the shape of a paid-up policy, not participating in the profits and only payable at the death of the insured. In this case the insured, in order to enjoy this advantage must prove to the Company successfully that he can satisfy all of the conditions necessary for such insurance.

The Company guarantees that the total cash surrender value of this policy at the end of the accumulation of profits period shall not be less than Mk. 20,000. The total cash surrender value includes outside of the guaranteed minimum amount, also such profits as the Company [14] allots at that time for said policy.

"If this policy is in force at the end of the accumulation period, the Company will notify the insured, or his legal successor of the results of each of the above-mentioned methods of payment. Until the expiration of the accumulation period no profits are allotable or allowable and this company shall not be obligated to impart any information of any kind and nature regarding the profit-accumulation before said period."

IV.

Prior to July 12, 1922, the said insured duly performed all and singular the conditions precedent on his part to be done and performed, and on July 12, 1922, he was alive and still is alive.

V.

Neither on July 12, 1922, nor at any time thereafter did the defendant give to plaintiff any information whatever as to the results of a settlement upon either of the methods mentioned and referred to in said policy, or as to the amount of accumulated profits to be allotted to this policy, although plaintiff duly demanded such information, but instead defendant denied to plaintiff that it was liable on said policy, and repudiated all liability therein and informed plaintiff that it absolutely would not perform any of the covenants or provisions thereof. No part of said endowment fund has ever been paid.

VI.

During the 20 years between the issuance of said policy and July 12, 1922, defendant was engaged in its said business, not only in Germany, but also

in England, Australia, Italy, Norway, Sweden, Canada and the United States of America as well as elsewhere and had earned large profits, a portion of which were to be allotted to plaintiff's said policy as required by said policy, and said profits were earned and accumulated in American dollars, and invested in American dollars and have always been kept and calculated and accounted in books of account and records written in the English language and kept in the city of New York, State of New York, in the United States of America, and have always been kept, recorded, calculated and accounted in the terms and values of [15] American dollars, of which profits, so earned and accumulated, plaintiff became, by virtue of his said policy entitled to his allotted share. A large part of said profits have been and are now kept in American dollars in the States of New York and of Oregon.

VII.

The share of said profits, so earned and accumulated, which by the terms of said policy were earned by and to be allotted and paid to plaintiff as the holder of said policy, amounts to and is the full sum of $2,385.00, no part of which has been paid.

VIII.

Plaintiff was unable to obtain from defendant the information concerning the amount of said profits so as to make his election as to which of said methods of settlement he would choose, and defendant refused to give said information and denied

its liability so to do. Plaintiff therefore sought and obtained said information for himself receiving said information at the time of and immediately prior to the filing of his complaint herein, and plaintiff alleges that the time between July 12, 1922, and the date of the filing of the complaint herein was a reasonable time within which plaintiff in the exercise of due diligence should obtain the said information and make his election as to the method of settlement. At the time of and immediately prior to the *filing the* complaint herein plaintiff elected to take settlement in cash and in and by said complaint he demanded payment and settlement in cash, and he does hereby demand the same and plaintiff does hereby tender to defendant a surrender of his said policy of insurance.

IX.

The exchange value of one German mark, legal tender of Germany, the medium of payment of the insurance fund specified in said policy, on July 12, 1922, was the sum of Twenty-three and Eighty-five Hundredths Cents ($0.2385).

X.

The amount insured by said policy and the premium fixed by said policy were carried on the books and in the accounts of defendant in the city of New York, State of New York in the United States of America, [16] in American dollars at the rate of the mark, legal tender of Germany, *to* Twenty-three and Eighty-five Hundredths Cents ($0.2385).

XI.

That the exchange value of the mark, legal tender of Germany, at the time of the commencement of this action was, ever since has been and now is the sum of Twenty-three and Eighty-five Hundredths Cents ($0.2385).

XII.

By reason of the facts aforesaid and the repudiation of said policy of insurance and endowment contract by defendant and its failure to pay said endowment fund and said profits said insured and this plaintiff have been and are damaged in the full sum of $7,155.00, together with interest thereon at the rate of 6% per annum from the date of filing this complaint, no part of which has been paid.

XIII.

After July 12, 1922, and after the said repudiation of said policy by defendant, aforesaid, and prior to the commencement of this action, said insured for a valuable consideration assigned and transferred to plaintiff all his rights and interest in and to said policy of insurance and said endowment fund and said profits, and also all his rights to and demands for damages by reason of defendant's said repudiation of said policy and its refusal to pay said endowment fund and to distribute and pay said profits, and plaintiff is now the owner and holder thereof.

XIV.

By reason of the facts aforesaid plaintiff has been damaged specially in the further sum of $700.00

which sum plaintiff alleges is a reasonable sum to be allowed as attorney's fees in this action, for the payment of which to his attorney appearing in this action plaintiff has necessarily and because of defendant's said wrongful acts incurred a liability.

And for a third further and separate cause of action against defendant, plaintiff complains and alleges: [17]

I.

That at all times hereinafter mentioned, the defendant, New York Life Insurance Company, was and now is a mutual life insurance corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of Oregon as a foreign corporation in compliance with the laws of the State of Oregon.

That the business of defendant corporation, among other things is and was during all times herein mentioned the authorized issuance of life insurance and endowment policies upon the mutual insurance plan in the State of Oregon, the United States, the former Empire of Germany, now the Republic of Germany, and in other countries.

II.

That on or about September 24th, 1902, upon the application of one Hermann Kaiser-Bluth, hereinafter called the insured, to the defendant corporation and in consideration of the payment by the said insured of an annual premium of 1,524.30

marks, legal tender of Germany, and in further consideration of a similar premium to be paid annually on or before September 24th, of each succeeding year during the continuance of the policy, for a stated period of twenty (20) years, the defendant made, executed, sealed and delivered to said insured its policy of life insurance and endowment contract numbered 1505347; a substantial copy of the first two pages of said policy is attached to the answer and marked Exhibit "D." The remainder of said policy is substantially the same as pages 3 to 7 inclusive of Exhibit "A" attached to said answer, except as to amount of insurance, dates and names of parties and except that on the first page of said policy the provision commencing with the words "If, however" and ending with the words "cease and determine" is as alleged in Paragraph III hereof, and not as set out in said Exhibit "D."

III.

In said policy of insurance it is provided, among other things as follows:

"If, however, the insured survives the maturity of the insurance, that is the 24th of September, 1922, the amount of 30,000 Marks D. Rwg. will be paid to Mrs. Marie Kaiser Bluth, nee Heinfeld, wife of the insured and in case of her said death then to the insured's legal [18] representatives, and this policy at the same time will cease and determine."

Said policy also contains provisions providing for the ascertainment, calculation and distribution

of the profits of the Company to the holder of said policy wherein all the earnings of the company from business wherever transacted and all profit participating policies wherever issued and wherever the holders thereof reside and wherever the same are payable, are considered and figured into the calculation.

IV.

Prior to September 24, 1921, plaintiff's assignors, the said Herman Kaiser Bluth and the said Marie Kaiser Bluth, duly performed all and singular the conditions precedent on their parts to be done and performed and on September 24, 1921, they and each of them failed to pay the premium then falling due and the same has never been paid. And neither said Herman Kaiser Bluth nor said Marie Kaiser Bluth have at any time notified defendant of a choice under Paragraph VII of the conditions of said policy hereinafter mentioned.

V.

In and by paragraph VII of the conditions of said policy it is provided as follows:

"If at the time of lapse the policy has been in force not less than three full years, the same may:

(A) be converted, by endorsement, into a paid-up policy for a reduced amount of insurance, as stated in the following table; or,

(B) be purchased by the Company for cash for a sum, the amount of which is likewise stated in the following table.

In either case the insured must, within six months following the due date of the unpaid pre-

mium, notify the Company in writing of his choice and return the policy. If the policy has not been reduced or surrendered for its cash value as stated above:

(C) the insurance will automatically be extended for the amount of Marks 30000 D. Rwg. for the period set forth in the table below, counting from the day to which the premium has been paid in conformity with the contract. The insurance terminates at the end of the said [19] period; if, however, the insured is then still living the amount set forth in paragraph 'insurance extension' will be paid in cash.

The paid-up insurance for a reduced amount and the extended insurance, as specified above, are subject to the conditions of the present policy, however without payment of premiums, without rights to loans, and without participation in the profits, as specified in Article X following.

If at the time of the non-payment of a premium there is any indebtedness to the Company under the policy, such indebtedness (should the insured wish to avail himself of the above provisions of reduction, or of the extended insurance) must be repaid to the Company within 30 days following the due date of the said unpaid premium. If such indebtedness has not been repaid, the Company shall consider the policy as automatically lapsed and no longer in force by paying to the insured the cash surrender value, mentioned in this Article under 'B,' after deduction of all sums due as to principal, interest and expenses. In this latter

case the unpaid premium is not considered an indebtedness to the Company."

VI.

The period set forth in the table attached to said policy for extended insurance at the expiration of 19 years is two (2) years, and the amount set forth paragraph "insurance extension" attached to said policy is 25,500 marks.

VII.

On September 24, 1923, the said Herman Kaiser Bluth and the said Marie Kaiser Bluth were alive and they still are alive.

VIII.

On or about January 1, 1924, the said Herman Kaiser Bluth and the said Marie Kaiser Bluth demanded of defendant the payment of said 25,-500 marks pursuant to the provisions of said policy, but defendant refused then to pay any part thereof and repudiated said policy and disclaimed any and all liability thereon or thereunder and stated that it was not bound thereby and that it would not perform any of the covenants thereof, and defendant has never paid any part of said sum or delivered any part of said 25,500 marks. [20]

IX.

The exchange value of one German mark, legal tender of Germany, the medium of payment of said endowment fund specified in said policy, with money of the United States of America, was on

September 24, 1923, and at all times thereafter and is now the sum of Twenty-three and Eighty-five Hundredths Cents ($0.2385).

X.

By reason of the facts aforesaid and the repudiation of said policy of insurance and endowment contract by defendant and its failure to pay said endowment fund said insured Herman Kaiser Bluth and said beneficiary Marie Kaiser Bluth and this plaintiff have been and are damaged in the full sum of $6,081.75, together with interest thereon at the rate of 6% per annum from the date of filing this complaint, no part of which has been paid.

XI.

After January 1, 1924, and after said repudiation of said policy by defendant, aforesaid, and prior to the commencement of this action, said Herman Kaiser Bluth and said Marie Kaiser Bluth, for a valuable consideration, assigned and transferred to plaintiff all their rights and interests in and to said policy of insurance and said endowment fund and also all their rights to and demands for damages by reason of defendant's said repudiation of said policy and its refusal and failure to pay said endowment fund, and plaintiff is now the owner and holder thereof.

XII.

By reason of the facts, aforesaid, plaintiff has been and is damaged specially in the further sum of $600.00 which plaintiff alleges is a reasonable

sum to be allowed as attorney's fees in this action, for the payment of which to his attorney appearing in this action plaintiff has necessarily and because of defendant's said wrongful acts incurred a liability.

And for a fourth further and separate cause of action against defendant plaintiff complains and alleges as follows: [21]

I.

That at all times hereinafter mentioned, the defendant, New York Life Insurance Company, was and now is a mutual life insurance corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of Oregon as a foreign corporation in compliance with the laws of the State of Oregon.

That the business of the defendant corporation, among other things, is and was during all times herein mentioned the authorized issuance of life insurance and endowment policies upon the mutual insurance plan in the State of Oregon, the United States, the former Empire of Germany, now the Republic of Germany, and in other countries.

II.

That on or about December 7th, 1903, upon the application of one Wilhelm Stadelmeyer, hereinafter called the insured, to the defendant corporation and in consideration of the payment by the said insured of an annual premium of 413.10 marks, legal tender of Germany, and in further consideration of a similar premium to be paid annually on

or before December 7th of each succeeding year during the continuance of the policy, for a stated period of twenty (20) years, the defendant made, executed, sealed and delivered to said insured its policy of life insurance and endowment contract numbered 2508291, a substantial copy of which is attached to the answer and marked Exhibit "E."

III.

That the said insured herein duly performed all the conditions of said policy by him to be performed up to and including the premium payable in 1904 and duly paid to the defendant the annual premiums each year and performed each and every condition or covenant to be performed by him.

IV.

That by said policy the defendant agreed, in consideration of the payment of the original and of subsequent annual premiums as aforesaid, to insure the life of the said insured in the sum of 10,000 marks, legal tender of Germany, beginning with noon, December 7th, 1903. That said policy further provided that after said policy was in full force one full year, annual premiums had been paid, a certain fixed cash [22] value attached thereto in favor of the insured, for a certain amount of fixed insurance without the payment of any additional premiums whatsoever. Said amount to be paid at the expiration date of the policy, December 7th, 1928. This amount of premium free insurance at the said date in December, 1904, amounted to 600 marks, legal tender of Germany.

That the option given to the insured to exercise his right to have said premium free insurance was properly exercised and as a result the defendant company converted the policy heretofore issued to him to a premium free insurance in the sum of 600 marks, legal tender of Germany, payable to said insured if alive on December 7th, 1928; in case of death to his beneficiary as named. Proper endorsement of said conversion of insurance to premium free insurance in said sum of 600 marks, legal tender of Germany, was entered on the records of the company and proper notation thereof made upon the policy issued to the insured herein, said policy being policy number 2508291. That in accordance with the terms of said policy, there was therefore due and payable by the defendant to the insured the sum of 600 marks, legal tender of Germany, which said payment was due on December 7th, 1928, and which said sum has heretofore been demanded and plaintiff herewith offers the surrender of said policy to the defendant as against such payment.

V.

That there was no debt to the defendant outstanding on said policy on its maturity date, nor has any debt been incurred thereon since that date. That said insured is still alive.

VI.

That the insured has heretofere and subsequent to December 7, 1928, demanded of defendant payment of the amounts due under and by virtue of

said policy, but the defendant at that time and at all times since said date has refused such payment.

VII.

That after December 7, 1928, and after said demand and refusal and prior to the institution of this action, all right, title and interest in and to said policy and all rights arising from, in and to the same and the right of insured to damages for breach of said contract [23] were for a valuable consideration assigned to Paul Herrmann, plaintiff herein by the said insured and that the said plaintiff is now the legal and equitable owner thereof and that due and proper notice of said assignment has been given to the defendant herein.

VIII.

By reason of the facts aforesaid plaintiff was damaged in the full sum of $143.00, no part of which has been paid.

IX.

That the exchange value of one German mark, legal tender of Germany, the medium of exchange specified in said policy was at all times herein mentioned and now is not less than Twenty-three and Eighty-five Hundredths Cents ($0.2385.).

X.

And by reason of the said facts aforesaid plaintiff has suffered special damages in the sum of $100.00, which sum plaintiff alleges is a reasonable sum to be allowed as attorney's fees in this action, and for the payment of which to his attorneys appearing in this action plaintiff has necessarily and

because of defendant's said wrongful acts incurred a liability.

WHEREFORE *defendant* demands judgment against defendant for the sum of $2,146.50 and $74.90 and $83.50 and $95.40, with interest thereon at the rate of 6% per annum from the date of filing the complaint herein, and the further sum of $350.00; and for the further sum of $7,155.00 with interest thereon at the rate of 6% per annum from the date of filing the complaint herein, and the further sum of $700.00; and for the further sum of $6,081.75 with interest thereon at the rate of 6% per annum from the date of filing the complaint herein, and the further sum of $600.00; and for the further sum of $143.00 with interest thereon at the rate of 6% per annum from the date of filing the complaint herein, and the further sum of $100.00, and for the costs and disbursements of this action.

C. T. HAAS,
Attorney for Plaintiff. [24]

State of Oregon,
County of Multnomah,—ss.

I, C. T. Haas, being first duly sworn, depose and say that I am the attorney for the plaintiff in the above-entitled action and that the foregoing amended complaint is true as I verily believe. I make this verification by reason of the fact that the plaintiff is not a resident of Multnomah County, or the State of Oregon, and that the within action is based upon documents in my possession.

C. T. HAAS.

Subscribed and sworn to before me this 16th day of May, 1930.

[Seal] IDA BELLE TREMAYNE,
Notary Public for Oregon.

My commission expires 7/10/32.

State of Oregon,
County of Multnomah,—ss.

Due service of the within second amended complaint is hereby accepted in Multnomah County, Oregon, this 17th day of May, 1930, by receiving a copy thereof, duly certified to as such by C. Y. Haas of attorneys for plaintiff.

B. S. HUNTINGTON,
Attorney for Defendant.

Filed May 19, 1930. [25]

AND AFTERWARDS, to wit, on the 24th day of April, 1930, there was duly filed in said court an answer to amended complaint, in words and figures as follows, to wit: [26]

[Title of Court and Cause—Cause No. L.–10,535.]

ANSWER TO AMENDED COMPLAINT.

Comes now the defendant, and answering the first cause of action contained in the amended complaint of the plaintiff herein:

I.

Admits that at all times mentioned in the amended complaint the defendant was, and now is,

a corporation organized and existing under and by virtue of the laws of the State of New York, and that it is now doing business in the State of Oregon as a foreign insurance company in compliance with the laws of the State of Oregon relating thereto. Admits that the business of the defendant, among other things, during all of said times was and now is the entering into and issuance of life insurance policies. Admits that for some years prior to August 1, 1914, it was authorized to and did issue policies of insurance in the German Empire and in other foreign countries. Denies that defendant at any time was and now is authorized to or did issue life insurance policies in the State of Oregon or in any part of the United States other than the State of New York. Denies that defendant has issued any policies of life insurance in the Empire of Germany, or its successor, the Republic of Germany, since August 1, 1914. (1) [27] Denies each and every other allegation contained in Paragraph I of said first cause of action.

II.

Admits that on or about the 7th day of February, 1905, on the application of Ludwig Schnell, and in consideration of the annual premium of 522.90 marks D. Rwg., or Deutsches Reichswehrung mark, which translated into English means marks in the currency of the German Empire, the defendant executed, issued and delivered to the said Schnell, in Germany, its policy No. 1554478. Said policy was written in the German language, payable in the German currency, and by the terms thereof

all payments to be made under or pursuant to said policy were to be made in Germany. In this connection the defendant further alleges that in the said application for the policy the said Schnell gave his place of birth as Strehlen, Germany, and his address and place of residence as Breslau, Germany, which is the present address and place of residence of said Schnell, as defendant is informed and believes, and therefore avers the fact to be. An accurate English translation of said policy is hereto attached, marked Exhibit "A," and hereby made a part of this answer. Denies each and every other allegation contained in Paragraph II of said first cause of action.

III.

Answering Paragraph III of said first cause of action, the defendant avers that a true English translation of said policy of insurance is attached hereto as aforesaid, and reference is made thereto for a full and particular statement of all the terms and conditions of the policy. Denies the remaining allegations contained in said Paragraph III.

IV.

Denies the allegations contained in Paragraph IV of (2) [28] said first cause of action.

V.

Answering Paragraph V, this defendant avers that some time prior to September 6, 1921, the said Schnell borrowed a sum of money from the defendant upon the aforesaid policy of insurance. Thereafter, and on or about December 31, 1921, the defendant assigned and transferred certain of its

business, policies and assets to Kronos Deutsche Lebenversicherungs Aktiengesellschaft, a corporation duly organized and existing under and by virtue of the laws of Germany, hereinafter called Kronos. Included in said transfer was the aforesaid policy issued to Schnell, and Kronos assumed all obligation and liability thereunder, and agreed to and did release the defendant from further liability thereunder; and in consideration of said premises and other considerations the said Schnell released and discharged defendant from all liability under the said policy and agreed to look solely to the said Kronos for the performance thereof, and thereupon dealt with the Kronos with respect to the said loan. In this connection the defendant is informed and avers the fact to be that some time after September 1, 1922, the exact date being unknown to the defendant, the said Schnell paid to Kronos the amount of the loan outstanding against the said policy. The defendant has not any knowledge or information as to whether any loan has been made upon or debt contracted against the security of said policy since December 31, 1921, or as to whether there is any debt outstanding against the same at this time. Denies the remaining allegations contained in said Paragraph V.

VI.

Answering Paragraph VI of said first cause of action, the defendant has not any knowledge or information sufficient (3) [29] to form a belief as to whether the insured was alive on December 31, 1924, or is now alive, and therefore denies the same.

Denies each and every other allegation contained in said Paragraph VI.

VII.

Denies the allegations contained in Paragraph VII of said first cause of action.

VIII.

Denies the allegations contained in Paragraph VIII of said first cause of action.

IX.

Denies the allegations contained in Paragraph IX of said first cause of action.

X.

Denies the allegations contained in Paragraph X of said first cause of action, and in this connection the defendant denies that the plaintiff has suffered damages in the sum of $3,328.00, or any other sum whatsoever.

XI.

Denies the allegations contained in Paragraph XI of said first cause of action, and in this connection avers that plaintiff did not suffer damages in the sum of $350.00 or any other sum whatsoever, and that said sum of $350.00 or any other sum whatsoever is a reasonable attorneys' fee, and denies that plaintiff is entitled to recover any attorneys' fee in this cause.

XII.

Denies each and every allegation contained in Paragraph XII of said first cause of action. In this connection the defendant alleges that on or about the date the said policy (4) [30] of in-

surance was executed and delivered to said Schnell in Germany as aforesaid, and for a number of years thereafter until the great depreciation in the German mark currency during and following the World War, a German mark of the mark currency in which said contract of insurance was payable, to wit, the Deutsches Reichswehrung mark, was worth in the open market approximately 23.87 cents in American currency. The German Empire was succeeded in November, 1918, by a provisional form of government, which in the following year was succeeded by the Republic of Germany. During and following the World War the Deutsches Reichswehrung mark, that is the currency of German Reich, continued to be the currency of the German Empire until it ceased to exist, and thereafter continued to be the mark currency of the provisional government and its successor, the Republic of Germany, until August, 1924; but in the meantime it had greatly depreciated in purchasing power as contrasted with the currencies of other countries, as the result largely of currency inflation in Germany, the economic consequences of German defeat in the war, the burdens internally assumed to support the war, and those later externally imposed as the result of the war. By August 30, 1924, the mark currency in which said policy was payable had practically no purchasing power, and by laws enacted on said date the Republic of Germany created and put into circulation an entirely new currency, with a monetary unit known as the Reichsmark, and stabilized the old currency in which the said policy of insurance was payable on the basis of one million million of

old marks being equal to one Reichsmark. The conventional ratio thus established was in accordance with the actual ratio of value. By the terms of said legislation, after the establishment of a new German currency as aforesaid all contracts payable in the old marks, (5) [31] including the said insurance policy issued to Schnell, were payable in old marks of the number specified in the contracts, or in the new Reichsmark on the basis of one million million of the former for one of the latter. (6) [32]

FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE FIRST CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a first, further and separate answer and defense to the first cause of action contained in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things alleged in the foregoing answer, and by reference makes them a part hereof; and further alleges:

II.

That on the 7th day of February, 1905, and for some time prior thereto, and at all times thereafter, the defendant, under and pursuant to the German laws relating thereto, was authorized to transact the business of issuing life insurance policies and other forms of insurance within the German Empire. Theretofore, and on or about May 12, 1901,

there was duly enacted and promulgated by the Empire of Germany a law relating to the control and supervision of private insurance companies, the provisions of which were applicable to this defendant, and said laws have not been modified or repealed. A correct English translation of material portions of said law applicable to this defendant and to the issues in this case is hereto attached, marked Exhibit "B," and made a part hereof.

III.

On or about the 10th day of December, 1904, Ludwig Schnell, a native-born subject of Germany, and then and at all times thereafter a resident of the city of Breslau, Germany, made application to the defendant for a policy of life insurance, which application was issued by him in Breslau, Germany. In said application he gave his place of birth as Strehlen, in Silesia, Germany. Thereafter and pursuant to said application the defendant issued to the said Schnell, at its office in (7) [33] Berlin, Germany, policy of insurance numbered 1554478, to which reference was made in the foregoing answer, and an English translation of which is attached hereto as Exhibit "A." Said policy was executed and issued by the defendant in Germany, in the German language, was by its terms payable in German currency at the office of the defendant in Berlin. At the time said policy of insurance was issued and at all times thereafter the defendant was, and now is, domiciled in Germany, authorized there to transact business, and during all of said time has main-

tained and still maintains an office and agent upon whom service of process issued out of any af the courts of Germany may be made, and during all of said time the defendant was, and now is, subject to the jurisdiction of the German courts and other German civil authorities.

IV.

Prior to the 31st day of December, 1921, there was duly created and organized under the laws of Germany a life insurance stock company called and known as "Kronos Deutsche Lebens-Versicherungs-Aktien-Gesellschaft," hereinafter called the Kronos, which corporation was duly qualified, authorized and empowered by the laws of Germany, and particularly by article 14 of said Exhibit "B" and the regulations of the insurance authorities thereof, to engage in the business of issuing policies of life insurance in various forms, to take and receive the transfer of the insurance business of the defendant as hereinafter more particularly alleged, and to undertake the performance of certain outstanding contracts and insurance policies of the defendant, including the policy which had been issued to the said Schnell. On December 31, 1921, the defendant, conformably to and in compliance with the provisions (8) [34] of German law, and with the approval of the German insurance authorities, an approval given under the provisions of the German insurance law which authorized the transfer, assigned its business in Germany to said Kronos German Life Insurance Stock Company. Under the contract effecting such transfer defend-

ant transferred to the Kronos about December 31, 1921, all of its German business, policies and contracts, excepting one (1) policies payable by their terms in currencies other than German marks, and (2) policies held by citizens and subjects of other countries, and (3) policies held by German citizens and subjects who were not residents of Germany and were paying premiums outside of Germany. Said exceptions did not include the policy and contract of insurance issued to the said Schnell. The policies so excluded, amounting in number only to 422, were excluded from the transfer by the German insurance authorities for the reason that the business of said Kronos was limited to Germany.

Said Kronos was organized under the authority and supervision of Germany, and in accordance with its laws, by representatives of German banks and other financial and industrial companies and corporations of the highest financial responsibility, and at all times was, and now is, solvent and financially able to keep and perform all and singular its contracts and undertakings.

At the time of the transfer to the said Kronos and as a part of said transaction, and in consideration of the obligations hereinafter more particularly referred to, assumed by the Kronos, defendant transferred and turned over to said Kronos, conformably to German law and under the control of the German authorities supervising insurance, the defendant's entire German premium reserve, which included all reserves and assets of the (9) [35]

defendant accruing from or growing out of all premiums paid upon contracts of insurance issued by the defendant in Germany and consisting (1) of cash, (2) German federal, state and municipal bonds, and (3) amounts owing by reason of loans on policies, amounting in all to 114,560,678.08 marks, and, as required by the said Kronos and the said German authorities, a further sum of 2,000,000 marks, denominated a "caution" and in addition the said Kronos and the said German supervising insurance authorities required, in connection with said transfer and as a further consideration for the acceptance thereof by said Kronos, that there should be conveyed to said Kronos an additional sum, denominated an extra premium reserve, paid over by defendant and deposited with said German insurance authorities in order to provide the said Kronos with an additional and extra contingency fund to aid said Kronos to meet any further depreciation in the market value of the transferred and deposited securities so as to enable it to maintain the same dividend scale to policy-holders that defendant would have paid. And this additional sum so required, amounting to 37,107,137.34 marks, which was in excess of thirty-two (32%) per cent of the entire German premium reserve accruing from and growing out of premiums paid on contracts and policies of insurance issued in Germany, was paid over by the defendant.

In consideration of the premises, and with the approval and consent of the German government and the German insurance authorities having supervi-

sion over the matter, and conformably to German law, the said Kronos took over the said business, and insurance contracts of the defendant, including the policy issued to the said Schnell, and duly notified said Schnell and all other policy-holders of the defendant affected by such (10) [36] transfer on or about December 31, 1921, of such transfer and that said Kronos had taken said business and policies of the defendant over, and would perform the same and be thereafter substituted for the defendant in all obligations existing by virtue of or growing out of said policies of insurance, and in all future dealings with respect thereto, including the acceptance of all premiums thereafter falling due and the payment of all sums to policy-holders thereafter falling due. That in consideration of the premises the said Schnell assented to the said transfer and the substitution of the Kronos for the defendant, and agreed thereto, and that the defendant would be and was released from its obligation under said policy, and that he would look solely to the said Kronos for the performance thereof.

Thereafter the said Schnell dealt wholly with the said Kronos in reference to his said policy, and paid no further premiums to the defendant. That from the time of said transfer defendant had no direction of and took no part with reference to the said policy of insurance of any business in connection therewith in Germany, which was entirely carried on by the said Kronos as its own business, pursuant to German law and subject to the supervision of the German insurance authorities.

That by reason of the foregoing the defendant has been wholly released from any obligation or contract to the said Schnell by virtue of the policy of insurance issued to the said Schnell by the defendant as aforesaid, and the said Kronos has been substituted in the place and stead of the defendant. (11) [37]

SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE FIRST CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a second, further and separate answer and defense to the first cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in the foregoing answer and in the foregoing first, further and separate answer and defense to the first cause of action in the amended complaint, and by reference makes the same a part hereof; and further alleges:

II.

On or about December 10, 1904, at Breslau, in Germany, one Ludwig Schnell, a native-born subject of and resident in Germany, made application to defendant in Germany for a policy of life insurance, and pursuant to such application, and in consideration of the premiums to be paid as specified in the policy, the defendant issued to said Schnell, on or about February 7, 1905, at Berlin, Germany, its policy of insurance No. 1554478. Said

policy of insurance was written in the German language, and by its terms was payable in the mark currency of Germany, and in all respects was to be performed in Germany. An accurate English translation of said policy is attached to this answer as Exhibit "A."

At all times since said policy was issued the said Ludwig Schnell was, and now is, a resident in and citizen of Germany. In this connection the defendant alleges that it is informed and believes, and therefore avers the fact to be, that plaintiff is a native-born subject and citizen of Germany, and at all times has been a resident of Germany, and is now a resident of Heidelberg therein.

III.

That article 9 of the German Insurance Law of May (12) [38] 12, 1901, an English translation of portions of which is hereto attached as Exhibit "B," provides and requires that certain general insurance conditions shall be stipulated and contained in each policy of insurance issued by any life insurance company doing business in Germany, and among the conditions so required by law to be contained in every life insurance policy issued in Germany, including the policy of insurance issued by the defendant to the said Schnell, is the condition or stipulation making provision for the proceedings in case of dispute arising from the insurance contract, and designating the court competent to deal therewith.

Conformably to said statutory requirements the

said policy of insurance issued by the defendant to the said Schnell contains the following provision, translated into English:

> "For the execution of the present contract the Company designates as legal domicile the office of its General Representative for the State in which the insurance contract was made.
>
> "For all lawsuits that may arise under this contract the Company, as defendant, submits, at the option of the insured, either to the jurisdiction of the courts to which its General Representative for the State in which the insurance contract was made is subject, or to the jurisdiction of the courts to which the agent, through whom the insurance was made, is subject."

At the time said policy was issued, and ever since and now, the office of the General Representative of the defendant for Germany was and is at Berlin, which is the capital of Germany and also the capital of the German Federal State of Prussia, and the agent through whom the said insurance was negotiated at that time and thereafter was domiciled in Berlin and subject to the jurisdiction of the German courts sitting therein.

IV.

At the time said policy of insurance was issued and (13) [39] at all times thereafter the defendant maintained, and still maintains, an office and General Representative and authorized agent at Berlin, Germany, upon whom service of process is-

sued out of any of the courts of Germany may be made in behalf of and binding upon the defendant; and during all of said times the defendant was, and now is, subject to the processes and the jurisdiction of the German courts sitting at Berlin and the German courts sitting at Breslau, and generally to the German courts of the German Empire and its successor, the Republic of Germany. During all of said times the said German courts were, and now are, courts of general and competent jurisdiction, duly constituted and created under German law, and at all times were, and now are, open and functioning, and ready and competent to take jurisdiction with respect to any controversy, dispute or action on or arising out of the said policy of insurance and the enforcement of any right or claim based thereon which is justiciable in character.

During all of the times herein mentioned, and now, and in respect of the performance of said policy of insurance, or any dispute or disputed claim thereon, or any suit or action based on or arising therefrom, and brought in Germany, the courts at Berlin have exclusive jurisdiction and no other German court has or would have any right, power or jurisdiction in respect to such matters, or to pronounce any judgment or decree whatsoever upon or regarding the rights or obligations of either party to said policy or any other party claiming any rights thereunder, that would be recognized or have any force or validity in Germany. And neither the executive, administrative nor judicial authorities of Germany now or at any time lawfully could or would admit or recognize the right or jurisdiction

(14) [40] of any court in Germany or in any other country other than the courts of Berlin to pronounce any judgment or decree in respect of any dispute or controversy arising out of the policy.

And in this connection the defendant further alleges that any judgment pronounced by the courts of Oregon, or pronounced by any court other than the German court at Berlin, would not and will not be recognized by, and would not and will not be given any force or effect whatsoever in Germany, either under the laws of Germany or the principles of international comity, and will not and would not in anywise impair or take from the plaintiff a right to bring an action in the German courts at Berlin against this defendant upon the insurance policy. That provisions in contracts of insurance similar to those hereinbefore set forth with respect to the German courts having jurisdiction of disputed claims arising on the said Schnell policy, have been interpreted and the effect thereof determined by competent courts of Germany in sundry decisions, among others, that of Wilhelm Rinck against the New York Life Insurance Company, decided by the Berlin Court of Appeals on or about November 2, 1927. Said action was upon a policy of insurance issued by the defendant, which contained a clause or condition similar to the provisions herein set forth and which specified certain courts as having jurisdiction of disputes and lawsuits arising under the policy. The said Court of Appeals is a court of record, with general jurisdiction, and there is no higher court in Germany except the Supreme Court of the Reich, and the de-

cisions of said Court of Appeals are of binding force and effect under the laws of Germany and throughout the whole of Germany unless and until (15) [41] overruled and set aside by the Supreme Court. Said decision has not been overruled or set aside by the Supreme Court. By said decision it was held and adjudged that under the laws of Germany at the time the policy of insurance involved in the said Rinck case was issued, and at all times thereafter, being the aforementioned German insurance law of May 12, 1901, and the provisions of the policy, no action upon a policy of insurance containing such provisions could be prosecuted or maintained in any court, foreign or domestic, except the court specified in the policy, and that no other court had any power or jurisdiction to entertain such suit or action or pronounce judgment therein, and that no judgment pronounced by any other court had any force or effect whatsoever.

To the same effect are the decisions in the Dessau case, rendered by the Landsgericht (District Court) of Berlin on May 17, 1924, and in the Daunert case, rendered by the same court on June 28, 1928, and in the Gorgas case, rendered by the Court of Appeals sitting in Berlin, on January 9, 1929.

V.

That by reason of the matters and things hereinbefore alleged this court has no jurisdiction over the subject matter and in any event should not take or exercise jurisdiction herein or pronounce or undertake to pronounce any judgment for or against either party to this action, but should abate and dismiss the action. (16) [42]

ANSWER TO SECOND CAUSE OF ACTION.

Comes now the defendant, and answering the second cause of action set forth in the amended complaint herein:

I.

Admits that at all times mentioned in the amended complaint the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and that it is now doing business in the State of Oregon as a foreign insurance company in compliance with the laws of the State of Oregon relating thereto. Admits that the business of the defendant, among other things, during all of said times was and now is the entering into and issuance of life insurance policies. Admits that for some years prior to August 1, 1914, it was authorized to and did issue policies of insurance in the German Empire and in other foreign countries. Denies that defendant at any time was and now is authorized to and did issue life insurance policies in the State of Oregon or in any part of the United States other than the State of New York. Denies that defendant has issued any policies of life insurance in the Empire of Germany, or its successor, the Republic of Germany, since August 1, 1914. Denies each and every other allegation contained in Paragraph I of said second cause of action.

II.

Admits that on or about the 14th day of July, 1902, on the application of Martin Loeb, and in

consideration of the annual premium of 1,074.60 marks D. Rwg., or Deutsches Reichswehrung marks, which translated into English means marks in the currency of the German Empire, the defendant executed, issued and delivered to the said Loeb, in Germany, its policy No. 1501882. Said policy was written in the German (17) [43] language, payable in the German currency, and by the terms thereof all payments to be made under or pursuant to said policy were to be made in Germany. In this connection the defendant further alleges that in the said application for the policy the said Loeb gave his place of birth as Stuttgart, Germany, and his address and place of residence as Stuttgart, Germany, which is the present address and place of residence of said Loeb, as defendant is informed and believes, and therefore avers the fact to be. An accurate English translation of said policy is hereto attached, marked Exhibit "C," and hereby made a part of this answer. Denies each and every other allegation contained in Paragraph II of said second cause of action.

III.

Answering Paragraph III of said second cause of action, the defendant avers that a true English translation of said policy of insurance is attached hereto as aforesaid, and reference is made thereto for a full and particular statement of all the terms and conditions of the policy. Denies the remaining allegations contained in said Paragraph III.

IV.

Denies the allegations contained in Paragraph IV of said second cause of action.

V.

Answering Paragraph V, the defendant admits that there is no loan made by the defendant outstanding on said policy. As to the remaining allegations contained in Paragraph V the defendant has not any knowledge or information sufficient to form a belief, and therefore denies the same.

VI.

Answering Paragraph VI of the said second cause of action, the defendant has not any knowledge or information (18) [44] sufficient to form a belief as to whether the insured was alive on July 12, 1922, or is now alive, and therefore denies the same. Denies each and every other allegation contained in said Paragraph VI.

VII.

Denies the allegations contained in Paragraph VII of said second cause of action.

VIII.

Denies the allegations contained in Paragraph VIII of said second cause of action.

IX.

Denies the allegations contained in Paragraph IX of said second cause of action.

X.

Denies the allegations contained in Paragraph X of said second cause of action, and in this connection the defendant denies that the plaintiff has suffered damages in the sum of $7,155.00, or any other sum whatsoever.

XI.

Denies the allegations contained in Paragraph XI of said second cause of action, and in this connection avers that plaintiff did not suffer damages in the sum of $700.00 or any other sum whatsoever, and that said sum of $700.00 or any other sum whatsoever is a reasonable attorney's fee, and denies that plaintiff is entitled to recover any attorneys' fee in this cause.

XII.

Denies each and every allegation contained in Paragraph XII of said second cause of action. In this connection the defendant alleges that on or about the date the said policy (19) [45] of insurance was executed and delivered to the said Loeb in Germany as aforesaid, and for a number of years thereafter until the great depreciation in the German mark currency during and following the World War, a German mark of the mark currency in which said contract of insurance was payable, to wit, the Deutsches Reichswehrung mark, was worth in the open market approximately 23.87 cents in American currency. The German Empire was succeeded in November, 1918, by a provisional form of government, which in the following year was succeeded by the Republic of Germany. During and following the World War the Deutsches Reichswehrung mark, that is the currency of the German Reich, continued to be the currency of the German Empire untitl it ceased to exist, and thereafter continued to be the mark currency of the provisional government and its successor, the Republic of Germany, until August, 1924; but in the meantime it

had greatly depreciated in purchasing power as contrasted with the currencies of other countries, as the result largely of currency inflation in Germany, the economic consequences of German defeat in the war, the burdens internally assumed to support the war, and those later externally imposed as the result of the war. By August 30, 1924, the mark currency in which said policy was payable had practically no purchasing power, and by laws enacted on said date the Republic of Germany created and put into circulation an entirely new currency, with a monetary unit known as the Reichsmark, and stabilized the old currency in which the said policy of insurance was payable on the basis of one million million of old marks being equal to one Reichsmark. The conventional ratio thus established was in accordance with the actual ratio of value. By the terms of said legislation, after the establishment of a new German (20) [46] currency as aforesaid all contracts payable in the old marks, including the said insurance policy issued to Loeb, were payable in old marks of the number specified in the contracts, or in the new Reichsmark on the basis of one million million of the former for one of the latter. (21) [47]

FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE SECOND CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a first, further and separate answer and defense to the second cause of action contained in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things alleged in the foregoing answer, and by reference makes them a part hereof; and further alleges:

II.

That on the 14th day of July, 1902, and for some time prior thereto, and at all times thereafter, the defendant, under and pursuant to the German laws relating thereto, was authorized to transact the business of issuing life insurance policies and other forms of insurance within the German Empire. Theretofore, and on or about May 12, 1901, there was duly enacted and promulgated by the Empire of Germany a law relating to the control and supervision of private insurance companies, the provisions of which were applicable to this defendant, and said laws have not been modified or repealed. A correct English translation of material portions of said law applicable to this defendant and to the issues in this case is hereto attached, marked Exhibit "B," and made a part hereof.

III.

On or about the 30th day of April, 1902, Martin Loeb, a native-born subject of Germany, and then and at all times thereafter a resident of the city of Stuttgart, Germany, made application to the defendant for a policy of life insurance, which application was issued by him in Stuttgart, Germany, In said application he gave his place of birth *of birth* as Stuttgart, in Germany. Thereafter and pursuant to said application the defendant issued to the said Loeb, at its office in (22) [48] Stutt-

gart, Germany, policy of insurance numbered 1,501,882, to which reference was made in the foregoing answer, and an English translation of which is attached hereto as Exhibit "C." Said policy was executed and issued by the defendant in Germany, in the German language, was by its terms payable in German currency at the office of the defendant in Stuttgart. At the time said policy of insurance was issued and at all times thereafter the defendant was, and now is, domiciled in Germany, authorized there to transact business, and during all of said time has maintained and still maintains an office and agent upon whom service of process issued out of any of the courts of Germany may be made, and during all of said time the defendant was, and now is, subject to the jurisdiction of the German courts and other German civil authorities.

IV.

Prior to the 31st day of December, 1921, there was duly created and organized under the laws of Germany a life insurance stock company called and known as "Kronos Deutsche Lebens-Versicherungs-Aktien-Gesellschaft," hereinafter called the Kronos, which corporation was duly qualified, authorized and empowered by the laws of Germany, and particularly by Section 14 of said Exhibit "B" and the regulations of the insurance authorities thereof, to engage in the business of issuing policies of life insurance in various forms, to take and receive the transfer of the insurance business of the defendant as hereinafter more particularly alleged, and to undertake the performance of certain outstanding

contracts and insurance policies of the defendant, including the policy which had been issued to the said Loeb. On December 31, 1921, the defendant, conformably to and in compliance with the provisions (23) [49] of German law, and with the approval of the German insurance authorities, an approval given under the provisions of the German insurance law which authorized the transfer, assigned its business in Germany to said Kronos German Life Insurance Stock Company. Under the contract effecting such transfer defendant transferred to the Kronos about December 31, 1921, all of its German business, policies and contracts, excepting (1) policies payable by their terms in currencies other than German marks, and (2) policies held by citizens and subjects of other countries, and (3) policies held by German citizens and subjects who were not residents of Germany and were paying premiums outside of Germany. Said exception did not include the policy and contract of insurance issued to the said Loeb. The policies so excluded, amounting in number only to 422, were excluded from the transfer by the German insurance authorities for the reason that the business of said Kronos was limited to Germany.

Said Kronos was organized under the authority and supervision of Germany, and in accordance with its laws, by representatives of German banks and other financial and industrial companies and corporations of the highest financial responsibility, and at all times was, and now is, solvent and finan-

cially able to keep and perform all and singular its contracts and undertakings.

At the time of the transfer to the said Kronos, and as a part of said transaction, and in consideration of the obligations hereinafter more particularly referred to, assumed by the Kronos, defendant transferred and turned over to said Kronos, conformably to German law and under the control of the German authorities supervising insurance, the defendant's entire German premium reserve, which included all reserves and assets of the (24) [50] defendant accruing from or growing out of all premiums paid upon contracts of insurance issued by the defendant in Germany, and consisting (1) of cash, (2) German federal, state and municipal bonds, and (3) amounts owing by reason of loans on policies, amounting in all to 114,560,678.08 marks, and, as required by the said Kronos and the said German authorities, a further sum of 2,000,000 marks, denominated a "caution" and in addition the said Kronos and the said German supervising insurance authorities required, in connection with said transfer and as a further consideration for the acceptance thereof by said Kronos, that there should be conveyed to said Kronos an additional sum, denominated an extra premium reserve, paid over by defendant and deposited with said German insurance authorities in order to provide the said Kronos with an additional and extra contingency fund to aid said Kronos to mee*y* any further depreciation in the market value of the transferred and deposited securities so as to enable it to maintain the

same dividend scale to policy-holders that defendant would have paid. And this additional sum so required, amounting to 37,107,137.34 marks, which was in excess of thirty-two (32%) per cent of the entire German premium reserve accruing from and growing out of premiums paid on contracts and policies of insurance issued in Germany, was paid over by the defendant.

In consideration of the premises, and with the approval and consent of the German government and the German insurance authorities having supervision over the matter, and conformably to German law, the said Kronos took over the said business, and insurance contracts of the defendant, including the policy issued to the said Loeb, and duly notified said Loeb and all other policy-holders of the defendant affected by such transfer (25) [51] on or about December 31, 1921, of such transfer and that said Kronos had taken said business and policies of the defendant over, and would perform the same and be thereafter substituted for the defendant in all obligations existing by virtue of or growing out of said policies of insurance, and in all future dealings with respect thereto, including the acceptance of all premiums thereafter falling due and the payment of all sums to policy-holders thereafter falling due. That in consideration of the premises the said Loeb assented to the said transfer and the substituiton of the Kronos for the defendant, and agreed thereto, and that the defendant would be and was released from its obligation

under said policy, and that he would look solely to the said Kronos for the performance thereof.

Thereafter the said Loeb dealt wholly with the said Kronos in reference to his said policy, and paid no further premiums to the defendant. That from the time of said transfer defendant had no direction of and took no part with reference to the said policy of insurance or any business in connection therewith in Germany, which was entirely carried on by the said Kronos as its own business, pursuant to German law and subject to the supervision of the German insurance authorities.

That by reason of the foregoing the defendant has been wholly released from any obligation or contract to the said Loeb by virtue of the policy of insurance issued to the said Loeb by the defendant as aforesaid, and the said Kronos has been substituted in the place and stead of the defendant. (26) [52]

SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE SECOND CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a second, further and separate answer and defense to the second cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in the foregoing answer and in the foregoing first, further and separate

answer and defense to the second cause of action in the amended complaint, and by reference makes the same a part hereof, and further alleges:

II.

That on or about the 30th day of April, 1902, at Stuttgart, Germany, Martin Loeb, a native born citizen and subject and resident of said Stuttgart, Germany, made application to the defendant in said Stuttgart for a policy of life insurance, and pursuant to said application and in consideration of the premiums to be paid as specified in said policy, the defendant issued to the said Loeb, on or about July 14, 1902, at Stuttgart, its policy of insurance No. 1501882. Said policy of insurance was written in the German language, by its terms was payable in the mark currency of Germany, and in all respects was to be performed therein. An accurate English translation of said policy is attached hereto as Exhibit "C." At all times since said policy was issued the said Martin Loeb was, and now is, a resident in and citizen of Germany, his last known place of address being Stuttgart. During all of said times the plaintiff was and now is a native-born citizen and subject of Germany, residing at Heidelberg therein.

III.

That Article 9 of the German Insurance Law of May 12, 1901, an English translation of portions of which is hereto attached as Exhibit "B," provides and requires that certain general insurance conditions shall be stipulated and (27) [53] contained

in each policy of insurance issued by any life insurance company doing business in Germany, and among the conditions so required by law to be contained in every life insurance policy issued in Germany, including the policy of insurance issued by the defendant to the said Loeb, is the condition or stipulation making provision for the proceedings in case of dispute arising from the insurance contract, and designating the court competent to deal therewith.

Conformably to said statutory requirements the said policy of insurance issued by the defendant to the said Loeb contains the following provision, translated into English:

> "LEGAL DOMICILE: For the performance of the present contract, the courts in Stuttgart alone are competent; as legal domicile for the Company there is stipulated its office at Stuttgart and for the insured and the beneficiary the place stipulated in the application for the insurance."

The stipulated place of residence and domicile of the insured (there being no other beneficiary named) in said application was Stuttgart.

IV.

At the time said policy of insurance was issued, and at all times thereafter the defendant maintained, and still maintains, an agent and General Representative in Germany upon whom service of process issued out of the courts at Stuttgart or issued out of any of the courts of Germany may be

made in behalf of and binding upon the defendant, and during all of said times defendant was, and now is, subject to the processes and the jurisdiction of the German courts sitting at Stuttgart and the German courts sitting elsewhere within Germany. During all of said time the said courts were, and now are, courts of general and competent jurisdiction, duly constituted and (28) [54] created by the German government under German law, and at all times were, and now are, open and functioning and ready and competent to take jurisdiction with respect to any controversy, dispute or action on or arising out of the said policy of insurance and the enforcement of any right or claim based thereon which is justiciable in character.

During all of the times herein mentioned, and now, and in respect of the performance of said policy of insurance, or any dispute or disputed claim thereon, or any suit or action based on or arising therefrom, and brought in Germany, the courts at Stuttgart have exclusive jurisdiction and no other German court has or would have any right, power or jurisdiction in respect to such matters, or to pronounce any judgment or decree whatsoever upon or regarding the rights or obligations of either party to said policy or any other party claiming any rights thereunder, that would be recognized or have any force or validity in Germany. And neither the executive, administrative nor judicial, authorities of Germany now or at any time lawfully could or would admit or recognize the right or jurisdiction of any court in Germany or in any other

country other than the courts of Stuttgart to pronounce any judgment or decree in respect of any dispute or controversy arising out of the policy.

And in this connection the defendant further alleges that any judgment pronounced by the courts of Oregon, or pronounced by any court other then the German court at Stuttgart, would not and will not be recognized by, and would not and will not be given any force or effect whatsoever in Germany, either under the laws of Germany or the principles of international comity, and will not and would not in anywise impair (29) [55] or take from the plaintiff a right to bring an action in the German courts at Stuttgart against this defendant upon the insurance policy. That provisions in contracts of insurance similar to those hereinbefore set forth with respect to the German courts having jurisdiction of disputed claims arising on the said Loeb policy, have been interpreted and the effect thereof determined by competent courts of Germany in sundry decisions, among others, that of Wilhelm Rinck against the New York Life Insurance Company, decided by the Berlin Court of Appeals on or about November 2, 1927. Said action was upon a policy of insurance issued by the defendant, which contained a clause or condition similar to the provisions herein set forth, and which specified certain courts as having jurisdiction of disputes and lawsuits arising under the policy. The said Court of Appeals is a court of record, with general jurisdiction, and there is no higher court in Germany except the Supreme Court of the Reich, and the decisions of

said Court of Appeals are of binding force and effect under the laws of Germany and throughout the whole of Germany unless and until overruled and set aside by the Supreme Court. Said decision has not been overruled or set aside by the Supreme Court. By said decision it was held and adjudged that under the laws of Germany at the time the policy of insurance involved in the said Rinck case was issued, and at all times thereafter, being the aforementioned German insurance law of May 12, 1901, and the provisions of the policy, no action upon a policy of insurance containing such provisions could be prosecuted or maintained in any court, foreign or domestic, except the Court specified in the policy, and that no other court had any power or jurisdiction to entertain such suit or action or pronounce (30) [56] judgment therein, and that no judgment pronounced by any other court had any force or effect whatsoever.

To the same effect are the decisions in the Dessau case, rendered by the Landsgericht (District Court) of Berlin on May 17, 1924, and in the Daunert case, rendered by the same court on June 28, 1928, and in the Gorgas case, rendered by the Court of Appeals sitting in Berlin, on January 9, 1929.

V.

That by reason of the matters and things hereinbefore alleged this court has no jurisdiction over the subject matter and in any event should not take or exercise jurisdiction herein or pronounce or undertake to pronounce any judgment for or against

either party to this action, but should abate and dismiss the action. (31) [57]

THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE SECOND CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a third, further and separate answer and defense to the second cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things set forth in the foregoing answer and in the foregoing first and second defenses to the second cause of action, and by reference makes them a part hereof; and further alleges:

II.

That for more than six years prior to the commencement of this action the defendant was authorized to engage in and was engaged in the life insurance business in the State of Oregon, under the laws thereof relating to the transaction in said state of a life insurance business by a foreign corporation; and during all of said time the defendant maintained offices in Oregon and agents upon whom service of process issued out of any of the courts of the State of Oregon or out of the federal court sitting in Oregon might be made; and during all of said time had and maintained a statutory agent and attorney in fact upon whom service of process in Oregon might be ma*f*e in behalf of and binding

upon the defendant in any suit or action of which the courts sitting in Oregon might or properly should take jurisdiction. This action was commenced by the filing of the complaint with the Clerk of the court in which the action was brought on December 26, 1928.

III.

That the second cause of action set up or attempted to be set up in the amended complaint herein, if any exists, which defendant denies, accrued prior to July 1, 1922, and more than (32) [58] six years prior to the commencement of this action, and by reason thereof the said second cause of action is barred by the statute of limitations of the State of Oregon. (33) [59]

ANSWER TO THIRD CAUSE OF ACTION.

Comes now the defendant, and answering the third cause of action set forth in the amended complaint herein:

I.

Admits that at all times mentioned in the amended complaint the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and that it is now doing business in the State of Oregon as a foreign insurance company in compliance with the laws of the State of Oregon relating thereto. Admits that the business of the defendant, among other things, during all of said times was and now is the entering into and issuing of life insurance policies. Admits that for some years prior to August 1, 1914, it was authorized to and did issue policies of life insurance in the German Empire and

in other foreign countries. Denies that defendant at any time was and now is authorized to and did issue life insurance policies in the State of Oregon or in any part of the United States other than the State of New York. Denies that defendant has issued any policies of life insurance in the Empire of Germany, or its successor, the Republic of Germany, since August 1, 1914. Denies each and every other allegation contained in Paragraph I of said third cause of action.

II.

Admits that on or about the 27th day of September, 1902, on the application of Hermann Kaiser-Bluth, and in consideration of the annual premium of 1,524.30 marks D. Rwg., or Deutsches Reichswehrung marks, which translated into English means marks in the currency of the German Empire, the defendant executed, issued and delivered to the said Kaiser-Bluth, in Germany, its policy No. 1,505,347. Said policy was written in (34) [60] the German language, payable in the German currency, and by the terms thereof all payments to be made under or pursuant to said policy were to be made in Germany. In this connection the defendant further alleges that in the said application for the policy the said Kaiser-Bluth gave his place of birth as Naumberg, Germany, and his address and place of residence as Koln (Cologne), Germany, which is the present address and place of residence of said Kaiser-Bluth, as defendant is informed and believes, and therefore avers the fact to be. An accurate English translation of said policy is hereto attached and marked Exhibit "D," and made a

part of this answer, except the general and special conditions and tables therein contained, which are identical with those contained in the Schnell policy (Exhibit "A"), except as to amounts and tables of loans, paid-up and cash surrender values of said policy, and reference is hereby made to the said Schnell policy in this connection. Denies each and every other allegation contained in Paragraph II of said third cause of action.

III.

Answering Paragraph III of said third cause of action, the defendant avers that a true English translation of said policy of insurance is attached hereto as aforesaid, and reference is made thereto for a full and particular statement of all the terms and conditions of the policy. Denies the remaining allegations contained in said Paragraph III.

IV.

Denies the allegations contained in Paragraph IV of said third cause of action.

V.

Answering Paragraph V, the defendant admits that (35) [61] there is no loan made by the defendant outstanding on said policy. As to the remaining allegations contained in Paragraph V the defendant has not any knowledge or information sufficient to form a belief, and therefore denies the same.

VI.

Answering Paragraph VI of the said third cause of action, the defendant has not any knowledge or

information sufficient to form a belief as to whether the insured was alive on September 24, 1922, or is now alive, and therefore denies the same. Denies each and every other allegation contained in said Paragraph VI.

VII.

Denies the allegations contained in Paragraph VII of said third cause of action.

VIII.

Denies the allegations contained in Paragraph VIII of said third cause of action.

IX.

Denies the allegations contained in Paragraph IX of said third cause of action.

X.

Denies the allegations contained in Paragraph X of said third cause of action, and in this connection the defendant denies that the plaintiff has suffered damages in the sum of $10,732.00, or any other sum whatsoever.

XI.

Denies the allegations contained in Paragraph XI of said third cause of action, and in this connection avers that plaintiff did not suffer damages in the sum of $1,000.00 or any other sum whatsoever, and that said sum of $1,000.00 or (36) [62] any other sum whatsoever is a reasonable attorneys' fee, and denies that plaintiff is entitled to recover any attorneys' fee in this cause.

XII.

Denies each and every allegation contained in Paragraph XII of said third cause of action. In this connection the defendant alleges that on or about the date the said policy of insurance was executed and delivered to the said Kaiser-Bluth in Germany as aforesaid, and for a number of years thereafter until the great depreciation in the German mark currency during and following the World War, a German mark of the mark currency in which said contract of insurance was payable, to wit, the Deutsches Reichswehrung mark, was worth in the open market approximately 3.87 cents in American currency. The German Empire was succeeded in November, 1918, by a provisional form of government, which in the following year was succeeded by the Republic of Germany. During and following the World War the Deutsches Reichswehrung mark, that is the currency of the German Reich, continued to be the currency of the German Empire until it ceased to exist, and thereafter continued to be the mark currency of the provisional government and its successor, the Republic of Germany, until August, 1924; but in the meantime it had greatly depreciated in purchasing power as contrasted with the currencies of other countries, as the result largely of currency inflation in Germany, the economic consequences of German defeat in the war, the burdens internally assumed to support the war, and those later externally imposed as the result of the war. By August 30, 1924, the mark currency in which said policy was payable had practically no purchasing power,

and by laws enacted on (37) [63] said date the Republic of Germany created and put into circulation an entirely new currency, with a monetary unit known as the Reichsmark, and stabilized the old currency in which the said policy of insurance was payable on the basis of one million million of old marks being equal to one Reichsmark. The conventional ratio thus established was in accordance with the actual ratio of value. By the terms of said legislation, after the establishment of a new German currency as aforesaid all contracts payable in the old marks, including the said insurance policy issued to Kaiser-Bluth, were payable in old marks of the number specified in the contracts, or in the new Reichsmark on the basis of one million million of the former for one of the latter. (38) [64]

FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE THIRD CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a first, further and separate answer and defense to the third cause of action contained in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things alleged in the foregoing answer, and by reference makes them a part hereof; and further alleges:

II.

That on the 27th day of September, 1902, and for some time prior thereto, and at all times

thereafter, the defendant, under and pursuant to the German laws relating thereto, was authorized to transact the business of issuing life insurance policies and other forms of insurance within the German Empire. Theretofore, and on or about May 12, 1901, there was duly enacted and promulgated by the Empire of Germany a law relating to the control and supervision of private insurance companies, the provisions of which were applicable to this defendant, and said laws have not been modified or repealed. A correct English translation of material portions of said law applicable to this defendant and to the issues of this case is hereto attached, marked Exhibit "B," and made a part hereof.

III.

On or about the 21st day of September, 1902, Hermann Kaiser-Bluth, a native born subject of Germany, and then and at all times thereafter a resident of the city of Koln (Cologne), Germany, make application to the defendant for a policy of life insurance, which application was signed by him in Koln (Cologne), Germany. In said application he gave his place of birth as Naumberg, in Germany. Thereafter and pursuant to said application the defendant issued to the said Kaiser-Bluth, (39) [65] at its office in Berlin, Germany, policy of insurance numbered 1505347, to which reference was made in the foregoing answer, and an English translation of which, as aforesaid, is attached hereto as Exhibit "D." Said policy was executed and issued by the defendant in Germany, in the German language, was by its terms payable in

German currency at the office of the defendant in Berlin. At the time said policy of insurance was issued and at all times thereafter, the defendant was, and now is, domiciled in Germany, authorized there to transact business, and during all of said time has maintained and still maintains an office and agent upon whom service of process issued out of any of the courts of Germany may be made, and during all of said time the defendant was, and now is, subject to the jurisdiction of the German courts and other German civil authorities.

IV.

Prior to the 31st day of December, 1921, there was duly created and organized under the laws of Germany a life insurance stock company called and known as "Kronos Deutsche Lebens-Versicherungs-Aktien-Gesellschaft," hereinafter called the Kronos, which corporation was duly qualified, authorized and empowered by the laws of Germany, and particularly by Article 14 of said Exhibit "B," and the regulations of the insurance authorities thereof, to engage in the business of issuing policies of life insurance in various forms, to take and receive the transfer of the insurance business of the defendant as hereinafter more particularly alleged, and to undertake the performance of certain outstanding contracts and insurance policies of the defendant, including the policy which had been issued to the said Kaiser-Bluth. On December 31, 1921, the defendant, conformably to and in compliance with the (40) [66] provisions of German laws, and with the approval of the German in-

surance authorities, an approval given under the provisions of the German insurance law which authorized the transfer, assigned its business in Germany to said Kronos German Life Insurance Stock Company. Under the contract effecting such transfer defendant transferred to the Kronos about December 31, 1921, all of its German business, policies and contracts, exceoting (1) policies payable by their terms in currencies other than German marks, and (2) policies held by citizens and subjects of other countries, and (3) policies held by German citizens and subjects who were not residents of Germany and were paying premiums outside of Germany. Said exception did not include the policy and contract of insurance issued to the said Kaiser-Bluth. The policies so excluded, amounting in number only to 422, were excluded from the transfer by the German insurance authorities for the reason that the business of the said Kronos was limited to Germany.

Said Kronos was organized under the authority and supervision of Germany, and in accordance with its laws, by representatives of German banks and other financial and industrial companies and corporations of the highest financial responsibility, and at all times was, and now is, solvent and financially able to keep and perform all and singular its contracts and undertakings.

At the time of the transfer to the said Kronis, and as a part of said transaction, and in consideration of the obligations hereinafter more particularly referred to, assumed by the said Kronos,

defendant transferred and turned over to said Kronos, conformably to German law and under the control of the German authorities supervising insurance, the defendant's entire German premium reserve which included all reserves and assets (41) [67] of the defendant accruing from or growing out of all premiums paid upon contracts of insurance issued by the defendant in Germany, and consisting (1) of cash, (2) German federal, state and municipal bonds, and (3) amounts owing by reason of loans on policies, amounting in all to 114,560,678.08 marks, and, as required by the said Kronos and the said German authorities, a further sum of 2,000.000 marks, denominated a "caution" and in addition the said Kronos and the said German supervising insurance authorities required, in connection with said transfer and as a further consideration for the acceptance thereof by said Kronos, that there should be conveyed to said Kronos an additional sum, denominated an extra premium reserve, paid over by defendant and deposited with said German insurance authorities in order to provide the said Kronos with an additional and extra contingency fund to aid said Kronos to meet any further depreciation in the market value of the transferred and deposited securities so as to enable it to maintain the same dividend scale to policy-holders that defendant would have paid. And this additional sum so required, amounting to 37,107,137.34 marks, which was in excess of thirty-two (32%) per cent of the entire German premium reserve accruing from and growing out of premiums paid on contracts and policies of insurance

issued in Germany, was paid over by the defendant.

In consideration of the premises, and with the approval and consent of the German government and the German insurance authorities having supervision over the matter, and conformably to German law, the said Kronos took over the said business, and insurance contracts of the defendant, including the policy issued to the said Kaiser-Bluth, and duly notified said Kaiser-Bluth and all other policy-holders of the defendant affected by (42) [68] such transfer on or about December 31, 1921, of such transfer and that said Kronos had taken said business and policies of the defendant over, and would perform the same and be thereafter substituted for the defendant in all obligations existing by virtue of or growing out of said policies of insurance, and in all future dealings with respect thereto, including the acceptance of all premiums thereafter falling due and the payment of all sums to policy-holders thereafter falling due. That in consideration of the premises the said Kaiser-Bluth assented to the said transfer and the substitution of the Kronos for the defendant, and agreed thereto, and that the defendant would be and was released from its obligation under said policy, and that he would look solely to the said Kronos for the performance thereof.

Thereafter the said Kaiser-Bluth dealt wholly with the said Kronos in reference to his said policy, and paid no further premiums to the defendant. That from the time of said transfer defendant had no direction of and took no part with reference to the said policy of insurance or any business in

connection therewith in Germany, which was entirely carried on by the said Kronos as its own business, pursuant to German law and subject to the supervision of the German insurance authorities.

That by reason of the foregoing the defendant has been wholly released from any obligation or contract to the said Kaiser-Bluth by virtue of the policy of insurance issued to the said Kaiser-Bluth by the defendant as aforesaid, and the said Kronos has been substituted in the place and stead of the defendant. (43) [69]

SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE THIRD CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a second, further and separate answer and defense to the third cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in the foregoing answer and in the foregoing first, further and separate answer and defen*dant* to the third cause of action in the amended complaint, and by reference makes the same a part thereof; and further alleges:

II.

On or about September 21, 1902, at Koln (Cologne), in Germany, one Hermann Kaiser-Bluth, a native born subject of and resident in

Germany, made application to defendant in Germany for a policy of life insurance, and pursuant to such application, and in consideration of the premiums to be paid as specified in the policy, the defendant issued to said Kaiser-Bluth, on or about September 27th, 1902, at Berlin, Germany, its policy of insurance No. 1505347. Said policy of insurance was written in the German language, and by its terms was payable in the mark currency of Germany, and in all respects was to be performed in Germany. An accurate English translation of said policy is hereto attached and marked Exhibit "D," and made a part of this second further and separate answer and defense, except the general and special conditions and tables therein contained, which are identical with those contained in the Schnell policy (Exhibit "A"), except as to amounts and tables of loans, paid-up and cash surrender values of said policy, and reference is hereby made to the said Schnell policy in this connection.

At all times since said policy was issued the said Hermann Kaiser-Bluth was, and now is, a resident in and citizen (44) [70] of Germany. In this connection the defendant alleges that it is informed and believes, and therefore avers the fact to be, that plaintiff is a native-born subject and citizen of Germany, and at all times has been a resident of Germany, and is now a resident of Heidelberg therein.

III.

That Article 9 of the German Insurance Law of May 12, 1901, an English translation of portions

of which is hereto attached as Exhibit "B," provides and requires that certain general insurance conditions shall be stipulated and contained in each policy of insurance issued by any life insurance company doing business in Germany, and among the conditions so required by law to be contained in every life insurance policy issued in Germany, including the policy of insurance issued by the defendant to the said Kaiser-Bluth, is the condition or stipulation making provision for the proceedings in case of dispute arising from the insurance contract and designating the court competent to deal therewith.

Conformably to said statutory requirements the said policy of insurance issued by the defendant to the said Kaiser-Bluth contains the following provision, translated into English:

> "For the execution of the presen*y* contract the Company designates as legal domicile the office of its General Representative for the State in which the insurance contract was made.
>
> "For all lawsuits that may arise under this contract the Company, as defendant, submits, at the option of the insured, either to the jurisdiction of the courts to which its General Representative for the State in which the insurance contract was made is subject, or to the jurisdiction of the courts to which the agent, through whom the insurance was made, is subject."

At the time said policy was issued, and ever since and now, the office of the General Representative of the defendant (45) [71] for Germany was and is at Berlin, which is the capital of Germany and also the capital of the German Federal State of Prussia, and the agent through whom the said insurance was negotiated at that time and thereafter was domiciled in Berlin and subject to the jurisdiction of the German courts sitting therein.

IV.

At the time said policy of insurance was issued and at all times thereafter the defendant maintained, and still maintains, an office and General Representative and authorized agent at Berlin, Germany, upon whom service of process issued out of any of the courts of Germany may be made in behalf of and binding upon the defendant; and during all of said times the defendant was, and now is, subject to the processes and the jurisdiction of the German Courts sitting at Berlin and the German courts sitting at Koln (Cologne), and generally to the German courts of the German Empire and its successor, the Republic of Germany. During all of said times the said German courts were, and now are, courts of general and competent jurisdiction, duly constituted and created under German law, and at all times were, and now are, open and functioning, and ready and competent to take jurisdiction with respect to any controversy, dispute or action on or arising out of the said policy of insurance and the enforcement of any right or claim based thereon which is justiciable in character.

During all of the times herein mentioned, and now, and in respect of the performance of said policy of insurance, or any dispute or disputed claim thereon, or any suit or action based on or arising therefrom, and brought in Germany, the courts at Berlin will have exclusive jurisdiction and no other German court has or would have any right, power or jurisdiction in respect to such matters, or to pronounce any judgment or decree (46) [72] whatsoever upon or regarding the rights or obligations of either party to said policy or any other party claiming any rights thereunder, that would be recognized or have any force or validity in Germany. And neither the executive, administrative nor judicial authorities of Germany now or at any time lawfully could or would admit or recognize the right or jurisdiction of any court in Germany or in any other country other than the courts of Berlin to pronounce any judgment or decree in respect of any dispute or controversy arising out of the policy.

And in this connection the defendant further alleges that any judgment pronounced by the courts of Oregon, or pronounced by any court other than the German court at Berlin, would not and will not be recognized by, and would not and will not be given any force or effect whatsoever in Germany, either under the laws of Germany or the principles of international comity, and will not and would not in anywise impair or take from the plaintiff a right to bring an action in the German courts at Berlin against this defendant upon the insurance policy. That provisions in contracts of insurance similar

to those hereinbefore set forth with respect to the German courts having jurisdiction of disputed claims arising on the said Kaiser-Bluth policy, have been interpreted and the effect thereof determined by competent courts of Germany in sundry decisions, among others, that of Wilhelm Rinck against the New York Life Insurance Company, decided by the Berlin Court of Appeals on or about November 2, 1927. Said action was upon a policy of insurance issued by the defendant, which contained a clause or condition similar to the provisions herein set forth and which specified certain courts as having jurisdiction of disputes and lawsuits arising under the policy. The said Court of Appeals is a court of (47) [73] record, with general jurisdiction, and there is no higher court in Germany except the Supreme Court of the Reich, and the decisions of said Court of Appeals are of binding force and effect under the laws of Germany and throughout the whole of Germany unless and until overruled and set aside by the Supreme Court. By said decision it was held and adjudged that under the laws of Germany at the time the policy of insurance involved in the said Rinck case was issued, and at all times thereafter, being the aforementioned German insurance law of May 12, 1901, and the provisions of the policy, no action upon a policy of insurance containing such provisions could be prosecuted or maintained in any court, foreign or domestic, except the court specified in the policy, and that no other court had any power or jurisdiction to entertain such suit or action or pronounce judgment therein, and that no judgment pro-

nounced by any other court had any force or effect whatsoever.

To the same effect are the decisions in the Dessau case, rendered by the Landsgericht (District Court) of Berlin on May 17, 1924, and in the Daunert case, rendered by the same court on June 28, 1928, and in the Gorgas case, rendered by the Court of Appeals sitting in Berlin, on January 9, 1929.

V.

That by reason of the matters and things hereinbefore alleged this court has no jurisdiction over the subject matter and in any event should not take or exercise jurisdiction herein or pronounce or undertake to pronounce any judgment for or against either party to this action, but should abate and dismiss the action. (48) [74]

THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE THIRD CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a third, further and separate answer and defense to the third cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things set forth in the foregoing answer and in the foregoing first and second defenses to the third cause of action, and by reference makes them a part hereof; and further alleges:

II.

That for more than six years prior to the commencement of this action this defendant was authorized to engage in and was engaged in the life insurance business in the State of Oregon, under the laws thereof relating to the transaction in said state of a life insurance business by a foreign corporation; and during all of said time the defendant maintained offices in Oregon and agents upon whom service of process issued out of any of the courts of the State of Oregon or out of the federal court sitting in Oregon might be made; and during all of said time had and maintained a statutory agent and attorney-in-fact upon whom service of process in Oregon might be made in behalf of and binding upon the defendant in any suit or action of which the courts sitting in Oregon might or properly should take jurisdiction. This action was commenced by the filing of the complaint with the Clerk of the court in which the action was brought on December 26, 1928.

III

That the third cause of action set up or attempted to be set up in the amended complaint herein, if any exists, which defendant denies, accrued prior to September 1, 1922, and (49) [75] more than six years prior to the commencement of this action, and by reason thereof the said third cause of action is barred by the statute of limitations of the State of Oregon. (50) [76]

FOURTH FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE THIRD CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a fourth, further and separate answer and defense to the third cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things set forth in the foregoing answer and in the foregoing first, second and third defenses to the third cause of action, and by reference makes them a part hereof; and further alleges:

II.

That long prior to the commencement of this action and long prior to the alleged assignment of the said alleged third cause of action contained in the amended complaint unto the plaintiff, Paul Herrmann, and, to wit, in September, 1922, in Germany, there was paid unto the insured under the said policy of insurance the full sum of all principal, accumulated dividends and other sums due or claimed to be due and owing under said policy of insurance, in the mark currency called for by the said policy, and the sums so paid were accepted in full payment, satisfaction and discharge of all claims of whatsoever nature arising out of or based upon the said policy of insurance, and thereupon the said policy of insurance was delivered up and surrendered for cancellation. (51) [77]

ANSWER TO FOURTH CAUSE OF ACTION.

Comes now the defendant, and answering the fourth cause of action set forth in the amended complaint herein:

I.

Admits that at all times mentioned in the amended complaint the defendant was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and that it is now doing business in the State of Oregon as a foreign insurance company in compliance with the laws of the State of Oregon relating thereto. Admits that the business of the defendant, among other things, during all of said times was and now is the entering into and issuing of life insurance policies. Admits that for some years prior to August 1, 1914, it was authorized to and did issue policies of life insurance in the German Empire and in other foreign countries. Denies that defendant at any time was and now is authorized to and did issue life insurance policies in the State of Oregon or in any part of the United States other than the State of New York. Denies that defendant has issued any policies of life insurance in the Empire of Germany, or its successor, the Republic of Germany, since August 1, 1914. Denies each and every other allegation contained in paragraph I of said fourth cause of action.

II.

Admits that on or about the 7th day of December, 1903, on the application of Wilhelm Stadelmeyer,

and in consideration of the annual premium of 413.10 marks D. Rwg., or Deutsches Reichswehrung marks, which translated into English means marks in the currency of the German Empire, the defendant executed, issued and delivered to the said Stadelmeyer, in Germany, its policy numbered 2508291. Said policy was written in the German language, (52) [78] payable in the German currency, and by the terms thereof all payments to be made under or pursuant to said policy were to be made in Germany. In this connection the defendant further alleges that in the said application for the policy the said Stadelmeyer gave his place of birth as Pforzheim, Baden, Germany, and his address and place of residence as Pforzheim, Baden, German, which is the present address and place of residence of said Stadelmeyer, as defendant is informed and believes, and therefore avers the fact to be. An accurate English translation of said policy is hereto attached, marked Exhibit "E," and hereby made a part of this answer. Denies each and every other allegation contained in Paragraph II of said fourth cause of action.

III.

Defendant admits that said Stadelmeyer paid all the premiums upon said policy up to and including 1904. Denies the remaining allegations contained in Paragraph III of said fourth cause of action.

IV.

Answering Paragraph IV, the defendant admits that defendant issued a policy to said Stadel-

meyer, a true English translation of which is attached hereto as Exhibit "E," which fully states all of the terms and conditions of said policy, and admits that in 1905 the said Stadelmeyer ceased to pay premiums, and at that time the policy was converted into paid-up or premium free insurance in the sum or 600 marks of the character specified in the policy, of which proper notation was made upon the policy. Denies each and every other allegation contained in said Paragraph IV. (53) [79]

V.

Admits that there is no debt outstanding against said policy due the defendant. As to whether or not the said Stadlemeyer is alive or was at the commencement of this action the defendant has not any knowledge or information sufficient to form a belief, and therefore denies the same, and denies the remaining allegations contained in said Paragraph V of the fourth cause of action.

VI.

Denies the allegations contained in Paragraph VI of said fourth cause of action.

VII.

Denies the allegations contained in Paragraph VII of said fourth cause of action.

VIII.

Answering Paragraph VIII, defendant denies each and every allegation thereof, and denies that plaintiff has been damaged in the sum of $143.00 or any other sum.

IX.

Denies each and every allegation contained in Paragraph IX of said fourth cause of action. In this connection the defendant alleges that on or about the date the said policy of insurance was executed and delivered to the said Stadelmeyer in Germany as aforesaid, and for a number of years thereafter until the great depreciation in the German mark currency during and following the World War, a German mark of the mark currency in which contract of insurance was payable, to wit, the Deutsches Reichswehrung mark, was worth in the open market approximately 23.87 cents in American currency. The German Empire was succeeded in November, 1918, by a provisional form of government, which in the following year was succeeded by the Republic of Germany. During and following the World War the (54) [80] Deutsches Reichswehrung mark, that is the currency of the German Reich, continued to be the currency of the German Empire until it ceased to exist, and thereafter continued to be the mark currency of the provisional government and its successor, the Republic of Germany, until August, 1924; but in the meantime it had greatly depreciated in purchasing power as contrasted with the currencies of other countries, as the result largely of currency inflation in Germany, the economic consequences of German defeat in the war, the burdens internally assumed to support the war, and those later externally imposed as the result of the war. By August 30, 1924, the mark currency in which said policy was payable

had practically no purchasing power, and by laws enacted on said date the Republic of Germany created and put into circulation an entirely new currency, with a monetary unit known as the Reichsmark, and stabilized the old currency in which the said policy of insurance was payable on the basis of one million million of old marks being equal to one Reichsmark. The conventional ratio thus established was in accordance with the actual ratio of value. By the terms of said legislation, after the establishment of a new German currency as aforesaid, all contracts payable in the old marks, including the said insurance policy issued to Stadelmeyer, were payable in old marks of the number specified in the contracts, or in the new Reichsmark on the basis of one million million of the former for one of the latter.

X.

Denies the allegations contained in Paragraph X, of said fourth cause of action, and in this connection avers that plaintiff did not suffer damages in the sum of $100.00 or any other sum whatsoever, and that said sum of $100.00 or (55) [81] any other sum whatsoever is a reasonable attorneys' fee, and denies that plaintiff is entitled to recover any attorneys' fee in this cause. (56) [82]

FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE FOURTH CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a first, further and separate answer and de-

fense to the fourth cause of action contained in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things alleged in the foregoing answer, and by reference makes them a part hereof; and further alleges:

II.

That on the 7th day of December, 1903, and for some time prior thereto, and at all times thereafter, the defendant, under and pursuant to the German laws relating thereto, was authorized to transact the business of issuing life insurance policies and other forms of insurance within the German Empire. Theretofore, and on or about May 12, 1901, there was duly enacted and promulgated by the Empire of Germany a law relating to the control and supervision of private insurance companies, the provisions of which were applicable to this defendant, and said laws have not been modified or repealed. A correct English translation of material portions of said law applicable to this defendant and to the issues in this case is hereto attached, marked Exhibit "B," and made a part hereof.

III.

On or about the 3d day of December, 1903, Wilhelm Stadelmeyer, a native born subject of Germany, and then and at all times thereafter a resident of the city of Pforzheim, Baden, Germany, made application to the defendant for a policy of life insurance, which application was issued by

him in Pforzheim, Baden, Germany. In said application he gave his place of birth as Pforzheim, Baden, Germany. Thereafter and pursuant to said application the defendant issued to the said Stadelmeyer, (57) [83] at its office in Mannheim, Germany, policy of insurance numbered 2,508,291, to which reference was made in the foregoing answer, and an English translation of which is attached hereto as Exhibit "E." Said policy was executed and issued by the defendant in Germany, in the German language, was by its terms payable in German currency at the office of the defendant in Berlin. At the time said policy of insurance was issued, and at all times thereafter the defendant was, and now is, domiciled in Germany, authorized there to transact business, and during all of said time has maintained and still maintains an office and agent upon whom service of process issued out of any of the courts of Germany may be made, and during all of said time the defendant was, and now is, subject to the jurisdiction of the German courts and other German civil authorities.

IV.

Prior to the 31st day of December, 1921, there was duly created and organized under the laws of Germany a life insurance stock company called and known as "Kronos Deutsche Lebens-Versicherungs-Aktien-Gesellschaft," hereinafter called the Kronos, which corporation was duly qualified, authorized and empowered by the laws of Germany, and particularly by Article 14 of said Exhibit "B," and the regulations of the insurance authorities thereof,

to engage in the business of issuing policies of life insurance in various forms, to take and receive the transfer of the insurance business of the defendant as hereinafter more particularly alleged, and to undertake the performance of certain outstanding contracts and insurance policies of the defendant, including the policy which had been issued to the said Stadelmeyer. On December 31, 1921, the defendant, conformably to and in compliance with the (58) [84] provisions of German law, and with the approval of the German insurance authorities, an approval given under the provisions of the German insurance law which authorized the transfer, assigned its business in Germany to the said Kronos German Life Insurance Stock Company. Under the contract effecting such transfer defendant transferred to the Kronos about December 31, 1921, all of its German business, policies and contracts, excepting (1) policies payable by their terms in currencies other than German marks, and (2) policies held by citizens and subjects of other countries, and (3) policies held by German citizens and subjects who were not residents of Germany and were paying premiums outside of Germany. Said exceptions did not include the policy and contract of insurance issued to the said Stadelmeyer. The policies so excluded, amounting in number only to 422, were excluded from the transfer by the German insurance authorities for the reason that the business of said Kronos was limited to Germany.

Said Kronos was organized under the authority

and supervision of Germany, and in accordance with its laws, by representatives of German banks and other financial and industrial companies and corporations of the highest financial responsibility, and at all times was, and now is, solvent and financially able to keep and perform all and singular its contracts and undertakings.

At the time of the transfer to the said Kronos, and as a part of said transaction, and in consideration of the obligations hereinafter more particularly referred to, assumed by the Kronos, defendant transferred and turned over to said Kronos, comformably to German law and under the control of the German authorities supervising insurance, the defendant's entire German premium reserve, which included all reserves and assets of the (59) [85] defendant accruing from or growing out of all premiums paid upon contracts of insurance issued by the defendant in Germany, and consisting (1) of cash, (2) German federal, state and municipal bonds, and (3) amounts owing by reason of loans on policies, amounting in all to 114,560,678.08 marks, and, as required by the said Kronos and the said German authorities, a further sum of 2,000,000 marks, denominated a caution," and in addition the said Kronos and the said German supervising insurance authorities required, in connection with said transfer and as a further consideration for the acceptance thereof by said Kronos, that there should be conveyed to said Kronos an additional sum, denominated an extra premium reserve, paid over by defendant and deposited with

said German insurance authorities in order to provide the said Kronos with an additional and extra contingency fund to aid said Kronos to meet any further depreciation in the market value of the transferred and deposited securities so as to enable it to maintain the same dividend scale to policy-holders that defendant would have paid. And this additional sum so required, amounting to 37,107,-137.34 marks, which was in excess of thirty-two (32%) per cent of the entire German premium reserve accruing from and growing out of premiums paid on contracts and policies of insurance issued in Germany, was paid over by the defendant.

In consideration of the premises, and with the approval and consent of the German government and the German insurance authorities having supervision over the matter, and conformably to German law, the said Kronos took over the said business, and insurance contracts of the defendant, including the policy issued to the said Stadelmeyer, and duly notified said Stadelmeyer and all other policy holders of the defendant (60) [86] affected by such transfer on or about December 31, 1921, of such transfer and that said Kronos had taken said business and policies of the defendant over, and would perform the same and be thereafter substituted for the defendant in all obligations existing by virtue of or growing out of said policies of insurance, and in all future dealings with respect thereto, including the acceptance of all premiums thereafter falling due and the payment of all sums to policy-holders thereafter falling due. That in

consideration of the premises the said Stadelmeyer assented to the said transfer and the substitution of the Kronos for the defendant, and agreed thereto, and that the defendant would be and was released from its obligation under said policy, and that he would look solely to the said Kronos for the performance thereof.

Thereafter the said Stadelmeyer dealt wholly with the said Kronos in reference to his said policy, and paid no further premiums to the defendant. That from the time of said transfer defendant had no direction of and took no part with reference to the said policy of insurance or any business in connection therewith in Germany, which was entirely carried on by the said Kronos as its own business, pursuant to German law and subject to the supervision of the German insurance authorities.

That by reason of the foregoing the defendant has been wholly released from any obligation or contract to the said Stadelmeyer by virtue of the policy of insurance issued to the said Stadelmeyer by the defendant as aforesaid, and the said Kronos has been substituted in the place and stead of the defendant. (61) [87]

SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE TO THE FOURTH CAUSE OF ACTION CONTAINED IN THE AMENDED COMPLAINT.

For a second, further and separate answer and

defense to the fourth cause of action in the amended complaint, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in the foregoing answer and in the foregoing first, further and separate answer and defense to the fourth cause of action in the amended complaint, and by reference makes the same a part hereof; and further alleges:

II.

On or about December 3, 1903, at Pforzheim, Baden, Germany, one Wilhelm Stadelmeyer, a native-born subject of and resident in Germany, made application to defendant in Germany for a policy of life insurance, and pursuant to such application, and in consideration of the premiums to be paid as specified in the policy, the defendant issued to said Stadelmeyer, on or about December 7, 1903, at Mannheim, Germany, its policy of insurance No. 2,508,291. Said policy of insurance was written in the German language, and in all respects was to be performed in Germany. An accurate English translation of said policy is attached to this answer as Exhibit "E."

At all times since said policy was issued the said Wilhelm Stadelmeyer was, and now is, a resident in and citizen of Germany. In this connection the defendant alleges that it is informed and believes, and therefore avers the fact to be, that plaintiff is a native born subject and citizen of Germany,

and at all times has been a resident of Germany, and is now a resident of Heidelberg therein.

III.

That Article 9 of the German Insurance Law of May (62) [88] 12, 1901, an English translation of portions of which is hereto attached as Exhibit "B" provides and requires that certain general insurance conditions shall be stipulated and contained in each policy of insurance issued by any life insurance company doing business in Germany, and among the conditions so required by law to be contained in every life insurance policy issued in Germany, including the policy of insurance issued by the defendant to the said Stadelmeyer, is the condition or stipulation making provision for the proceedings in case of dispute arising from the insurance contract, and designating the court competent to deal therewith.

Conformably to said statutory requirements the said policy of insurance issued by the defendant to the said Stadelmeyer contains the following provision, translated into English:

> "LEGAL DOMICILE: For the performance of the present contract, the courts in Karlsruhe alone are competent; as legal domicile for the Company there is stipulated its office at Mannheim, and for the insured and the beneficiary the place stipulated in the application for the insurance."

The stipulated place of residence and domicile of

the insured (there being no other beneficiary named) in said application was Mannheim.

IV.

At the time said policy of insurance was issued and at all times thereafter the defendant maintained, and still maintains, an office and General Representative and authorized agent at Karlsruhe, Germany, upon whom service of process issued out of any of the courts of Germany may be made in behalf of and binding upon the defendant; and during all of said times the defendant was, and now is, subject to the (63) [89] processes and the jurisdiction of the German courts sitting at Karlsruhe and the German courts sitting at Mannheim, and generally to the German courts of the German Empire and its successor, the Republic of Germany. During all of said times the said German courts were, and now are, courts of general and competent jurisdiction, duly constituted and created under German law, and at all times were, and now are, courts of general and competent jurisdiction, duly constituted and created under German law, and at all times were, and now are, open and functioning, and ready and competent to take jurisdiction with respect to any controversy, dispute or action on or arising out of the said policy of insurance and the enforcement of any right or claim based thereon which is justiciable in character.

During all of the times herein mentioned, and now, and in respect of the performance of said policy of insurance, or any dispute or disputed claim thereon, or any suit or action based on or

arising therefrom, and brought in Germany, the courts at Karlsruhe have exclusive jurisdiction and no other German court has or would have any right, power or jurisdiction in respect to such matters, or to pronounce any judgment or decree whatsoever upon or regarding the rights or obligations of either party to said policy or any other party claiming any rights thereunder, that would be recognized or have any force or validity in Germany. And neither the executive, administrative nor judicial authorities of Germa*hy* now or at any time lawfully could or would admit or recognize the right or jurisdiction of any court in Germany or in any other country other than the courts of Karlsruhe to pronounce any judgment or decree in respect of any dispute or controversy arising out of the policy. (64) [90]

And in this connection the defendant further alleges that any judgment pronounced by the courts of Oregon, or pronounced by any court other than the German court at Karlsruhe, would not and will not be recognized by, and would not and will not be given any force or effect whatsoever in Germany, either under the laws o*r* Germany or the principles of international comity, and will not and would not in anywise impair or take from the plaintiff a right to bring an action in the German courts at Karlsruhe against this defendant upon the insurance policy. That provisions in contracts of insurance similar to those hereinbefore set forth with respect to the German courts having jurisdiction of disputed claims arising on the said Stadelmeyer policy, have been interpreted and the effect

thereof determined by competent courts of Germany in sundry decisions, among others, that of Wilhelm Rinck against the New York Life Insurance Company, decided by the Berlin Court of Appeals on or about November 2, 1927. Said action was upon a policy of insurance issued by the defendant, which contained a clause or condition similar to the provisions herein set forth and which specified certain courts as having jurisdiction of disputes and lawsuits arising under the policy. The said Court of Appeals is a court of record, with general jurisdiction, and there is no higher court in Germany except the Supreme Court of the Reich, and the decisions of said Court of Appeals are of binding force and effect under the laws of Germany and throughout the whole of Germany unless and until overruled and set aside by the Supreme Court. Said decision has not been overruled or set aside by the Supreme Court. By said decision it was held and adjudged that under the laws of Germany at the time the policy of insurance involved in the said Rinck case was issued, and at all times thereafter, being (65) [91] the aforementioned German insurance law of May 12, 1901, and the provisions of the policy, no action upon a policy of insurance containing such provisions could be prosecuted or maintained in any court, foreign or domestic, except the court specified in the policy, and that no other court had any power or jurisdiction to entertain such suit or action or pronounce judgment therein, and that no judgment pronounced by any other court had any force or effect whatsoever.

To the same effect are the decisions in the Dessau case, rendered by the Landsgericht (District Court) of Berlin on May 17, 1924, and the Daunnert case, rendered by the said court on June 28, 1928, and in the Gorgas case, rendered by the Court of Appeals sitting in Berlin, on January 9, 1929.

V.

That by reason of the matters and things hereinbefore alleged this court has no jurisdiction over the subject matter and in any event should not take or exercise jurisdiction herein or pronounce or undertake to pronounce any judgment for or against either party to this action, but should abate and dismiss the action. (66) [92]

FIRST FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH AND ALL OF THE CAUSES OF ACTION IN THE AMENDED COMPLAINT.

For a first, further and separate answer and defense to each and all of the four causes of action in the amended complaint contained, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in each of the answers to the causes of action set forth in the amended complaint and in the several separate answers and defenses to each of the causes of action contained in the amended complaint, and by reference makes them a part heerof; and further alleges:

II.

That at all times herein mentioned the defendant

was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, and in 1902, and theretofore and thereafter, and until about the first of August, 1914, the defendant issued policies of life insurance in various forms, within the jurisdiction and territorial limits of the Empire, afterwards the Republic of Germany.

III.

That on or about May 12, 1901, there was duly enacted by the legislative authority of the Empire of Germany certain laws pertaining to insurance companies doing business within the said Empire, including and applicable to this defendant. Said laws have not been repealed and are a part of the laws of the Republic of Germany, which succeeded the Empire of Germany. Said laws were written and enacted in the German language, and a substantial English translation of portions thereof, having application to this defendant, and to the issues involved in this cause, is hereto annexed, marked Exhibit "B," and hereby made a part hereof. Defendant was (67) [93] authorized and admitted to transact a life insurance business in Germany, and at all times fully and duly complied with all of the provisions of said laws and with all laws, decrees and regulations issued pursuant to authority of the German government in relation to the defendant and its said business.

IV.

That at the time each of the applications de-

scribed in the amended complaint was made, and each of the policies therein referred to was issued, each of the said insured, as well as the plaintiff, was a resident in, subject and citizen of the Empire of Germany and later its successor the Republic of Germany, and still is such resident and citizen of Germany. Each application and each policy aforesaid was written in the German language, each policy was issued in Germany by the General Agents and Representatives of the defendant there residing and domiciled in Germany, and each policy of insurance was delivered to the insured in Germany and was made payable in the mark currency of Germany, and in every other respect was performable therein.

That at all times since each of said policies was executed and issued by this defendant as aforesaid, the defendant has kept and maintained, and still keeps and maintains an office and an authorized agent and general representative at Berlin, Germany, upon who might be and may be served summonses and all other judicial processes issued out of the German courts, as well as other agents and other representatives in Germany upon whom service of process issued out of the court of Germany may be lawfully made. And during all of said times the defendant was and now is subject to be summoned into and within the jurisdiction of the courts of Germany. (68) [94]

V.

That at the time each of said policies of insurance was applied for and issued, and for many

years thereafter, the mark currency referred to in each of said applications and each of said policies was the mark currency of the Empire of Germany, and afterwards its successor, the Republic of Germany.

From about December 4, 1873, until the outbreak of the World War in 1914, the currency of the German Empire was defined and established by Articles I, II and III of the German laws of December 4, 1871, and Article XIV of the German Monetary Law of July, 1873, and the German Monetary Law of June 1, 1909.

On or about August 4, 1914, the legislative authority of the German Empire duly enacted a law amending the coinage and monetary laws of Germany then existing. Said latter law was published as the Law of August 4, 1914, in the Reichsgesetzblatt, page 326, and contained these provisions, among others:

"Paragraph 1:

Until further notice the provisions of section 9, paragraph 2, sentence 2 and 3 of the Coinage Act of June 1, 1909 (Reichsgesetzblatt, p. 507) are amended to the effect that federal treasury notes and notes of the Reichsbank can be issued instead of gold coin.

"Paragraph 2:

The Federal council is authorized to determine the date on which the provisions referred to in paragraph 1 of the present Act again become effective.

"Paragraph 3:

This Act becomes effective on the date of the publication."

And on August 4, 1914, the legislative body of the German Empire enacted a law concerning federal treasury notes, which was published on or about August 4, 1914, in the Reichsgesetzblatt 1914, at page 347, and contained the following provisions, among others: (69) [95]

"Paragraph 1:

Federal treasury notes are legal tender until further notice.

"Paragraph 2:

Until further notice the Reichshauptkasse (Note: the Central Imperial pay office) is not obligated to redeem the federal treasury notes nor is the Reichsmark obligated to redeem its notes.

"Paragraph 3:

Until further notice the private note banks are authorized to utilize notes of the Reichsbank for the redemption of their notes.

"Paragraph 4:

The Federal Council is authorized to determine the date on which the provisions of paragraphs 1 and 3 of the present Act becomes obsolete.

"Paragraph 5:

This Act becomes effective with regard to paragraphs 2 and 3, beginning July 31st, 1914,

and in all other respects on the date of its publications."

That the mark currency provided for in the various German laws hereinbefore referred to, and which continue to be the currency of the German Empire, and its successor, the German Republic, until after the German Monetary Act of August 30, 1924, became effective, will be hereinafter referred to as the old mark. The currency provided for by the said Monetary Act of August 30, 1924, the unit of which was and is the Reichsmark, will be hereinafter referred to as the new mark.

VI.

During the World War and subsequent thereto and as a consequence thereof, and the resulting impairment of German credit and currency inflation, the said old mark greatly depreciated in value and purchasing power. This depreciation resulted in a corresponding decrease or depreciation in the value of all notes, bonds, mortgages and other securities and investments payable in marks, which included practically all of the assets of the defendant in Germany, and there invested, as required by the German insurance authorities as a condition (70) [96] to its right to transact business in Germany, largely in German national, state and municipal bonds and other securities, all payable in the old mark. Said old mark continued to be the German currency in which all mark contracts were payable until after the enactment of the Monetary Act of August 30, 1924. Prior to the enact-

ment of said law and its companion Bank Act hereinafter referred to, all obligations theretofore created and payable in marks, including any and all obligations of either party to this action under or based upon the said policy of insurance, were payable and lawfully payable, at the option of either party to said contract of insurance, in the old mark in its depreciated value, that is, by paying the number of marks specified in the contract. And neither party to said contract of insurance had any other right or claim by reason of the provisions of said contract of insurance, or any other right or claim whatsoever against the other, save such as might be given as a matter of grace or public policy by the German courts pursuant to Section 242 of the German Civil Code which is hereinafter referred to.

VII.

By August, 1924, the old mark had depreciated to such an extent that it was practically valueless, and all securities, notes and obligations payable therein, including said policy of insurance, and including the assets of the defendant in Germany, had suffered a like depreciation. On August 30, 1924, the Republic of Germany duly enacted a new monetary law which provided for and created an entirely new currency, called the Reichsmark, and made it legal tender currency of Germany. As hereinbefore stated, the said new currency is herein referred to as the new mark. (71) [97]

Article I of said Monetary Act of August 30, 1924, translated from the German language into the English language, reads as follows:

"The currency of the German Reich is a gold currency. Its unit of account is the Reichsmark, which is divided into one hundred Reichspfennig."

Article V of said law, translated from the German language into the English language, reads as follows, in part:

"Insofar as a debt is payable in marks of old currencies, the debtor is entitled to effect the payment in such manner that one million millions of marks is made equal to one Reichsmark."

Said law has not been repealed or modified.

On August 30, 1924, Germany further duly enacted a Bank Act, which was published in the Reichsgesetzblatt of 1924, Part II, page 235 et seq., and Article 3 of said Bank Act, translated from the German language into the English language, reads substantially as follows:

"The Reichsbank is bound to call up the total amount of its old notes in circulation and to exchange them for Reichsmarks. One million millions of marks of former issues shall be replaced by one Reichsmark. The redeemed notes shall be destroyed. Detailed regulations for the calling up of the old notes and for the delays to be fixed for their delivery and cancellation shall be determined by the Directorate of the Reichsbank."

That Article I of the first decree for the carrying in effect of the Monetary Law (Erste Verordnung zu Durchfuhrung des Munzbesetzes) of October 10,

1924 (published in the Reichsgesetzblatt of 1924, Part II, page 383), provides that one million millions of old marks is made equal to one new mark, that is, one Reichsmark.

VIII.

The courts of Germany in construing and determining the effect of said monetary and banking laws of August 30, 1924, and the said Decree for carrying the same into effect, (72) [98] and the prior laws hereinbefore referred, have determined and declared that all contracts made in Germany and payable in German currency, including policies of insurance similar to those described in the amended complaint herein, are subject to and are to be construed according to German law, and that any person seeking judicially to recover upon any such contract, including any such insurance policy, if the contract was entered into prior to August 30, 1924, and therefore payable in the old mark, can only recover an amount of the new mark (Reichsmark) created and issued under the Monetary Laws of August, 1924, upon the basis of one new mark (Reichsmark) for each million million old marks called for in any such contract, and that the relief provided to certain enumerated classes of creditors under the Revaluation Law of Germany enacted July 16, 1925, cannot be given by any court or other judicial tribunal, but is within the exclusive jurisdiction of the administrative authorities and tribunals constituted and set up by the said Revaluation Law. As hereinafter more fully alleged, each of the policies of insurance described in the amended com-

plaint is embraced within the provisions of the said Revaluation Law.

The said law of August 30, 1924, stabilized the old mark on a ratio of one million million thereof to one new mark (Reichsmark), and the conventional ratio thus established corresponded with the actual ratio of value at the time. In this connection, and for the purpose of showing the holdings of the German courts conformably to the foregoing allegations, the following decisions are referred to and copies thereof annexed:

(a) Decision of the German Supreme Court of June 23, 1927, reported in Volume 118 of the Official Reports of the (73) [99] Decisions at pages 370 et seq., an accurate English translation of which is attached hereto as Exhibit "F."

(b) The decision of the Supreme Court in Civil Cases of June 6, 1928, an accurate English translation of which is attached hereto as Exhibit "G."

(c) The decision of April 15, 1929, of the Court of Appeals of Munich, in Protective Association of Foreign Policy Holders against Swiss Life Insurance Annuity Institute of Zurich, an accurate English translation of which is attached hereto as Exhibit "H."

There are many other German decisions to the said effect.

IX.

As heretofore alleged, all claims, including life insurance policies, not falling within the provisions of the Revaluation Law, entered into prior to August, 1924, and payable in the German mark currency authorized and in circulation prior to that

time, may be paid and discharged according to German law by payment on the basis of one new mark (Reichsmark) for each million million old marks of the currency called for by the contracts out of which any such claims arose. All of the policies described in the amended complaint herein are within the provisions of said Revaluation Law, so that the only remedies available to the holder of said policies, or either thereof, would be and is to recover in new mark currency (Reichsmarks) the value of the number of old marks called for by said insurance policies, upon the basis of one million million of the latter to one of the former, in which event the recovery would be so small that no court would pronounce judgment therefor; or seek (74) [100] relief provided for by the Revaluation Laws, in which event no co*uld* would have jurisdiction, but the matter is and would be exclusively within the control and jurisdiction of the administrative tribunals provided by the law.

As to claims not falling within the said Revaluation Laws and payable in German currency, the claimant has under German Law the technical legal right to recover judgment in a judicial proceeding for the value of the old mark currency called for by the contract, converted into the new mark (Reichsmark) on the basis of one of the latter to one million million of the former, and in addition thereto with respect to certain classes of claims the German courts have sometimes given a species of relief based on Section 242 of the German Civil Code. This section, translated into English, reads substantially as follows:

"The debtor is obliged to perform in such a manner as faith and credit with regard to custom requires."

Under this statutory provision the German courts, not being restrained by constitutional limitations, or controlled by precedent, or restricted by rules or principles of law as are the American courts, adopted the practice, as a matter of alleged public policy, of taking into account, in an action upon any contract or obligation, after the old mark had greatly depreciated, the necessities of the one party to a contract and the capacity of the other to pay; the economic condition of Germany generally, and particularly of the parties to the litigation and their dependents; the public interest in the matter, the loss or gain of either party to the obligation, having regard to the consequences of the war; and many other factors which the German courts considered as having relation (75) [101] to the public policy of that country. And upon these considerations the said German courts would, and did, in certain classes of cases, fix the amount which the debtor should pay and the creditors should receive, without any regard to the terms of the contractual relation upon which the action was based. That said law and the said practice in the German courts were and are peculiar to its jurisprudence and the judicial system and authority of that country, and the consideration upon which the German courts act, and the varying relief given, are not within the competency of an American court to consider or give. That plaintiff at all times was and now is a resident in and citizen and subject of Ger-

many. That by reason of the aforesaid facts, if the plaintiff were otherwise entitled to recover anything, the amount of his recovery would and should be limited to the value of the number of old marks called for in the policies of insurance mentioned herein, upon the basis of one million million thereof for one new mark (Reichsmark), the latter being worth in the open market approximately 23.85 cents in American currency, and such rights as he might have under the valorization laws of Germany and decrees issued thereunder, copies of English translations of certain applicable portions thereof being attached hereto as Exhibits "I," and "J," and hereinafter referred to, of which the administrative body set up thereunder has exclusive jurisdiction. (76) [102]

FOR A SECOND FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH AND ALL OF THE CAUSES OF ACTION IN THE AMENDED COMPLAINT.

For a second, further and separate answer and defense to each and all of the four causes of action in the amended complaint contained, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in each of the answers to the causes of action set forth in the amended complaint and in the several separate answers and defenses to each of the causes of action contained in the amended complaint, and to the first, further and separate answer and defense to each and all of the causes of action contained in the amended com-

plaint, and by reference makes them a part hereof; and further alleges:

II.

Alleges that on July 16, 1925, there was duly enacted by the Republic of Germany a law entitled "Gesetz uber die Aufwertung von Hypotheken und anderen Auspruchen," published in the issue of July 17, 1925, of the Reichsgesetzblatt, Teil 1, Number 31 of 1925, a correct English translation of the title thereto being "Law as to the rating-up (valorization or revaluation) of mortgages and other claims," generally known and called the Valorization or Revaluation law. A correct English translation of Sections 59, 60 (subsections 1 and 2), 61 and 62 of said law is attached hereto, marked Exhibit "I," and here referred to and made a part of this answer. On November 29, 1925, the Minister of Justice of the Republic of Germany, being duly authorized so to do, duly promulgated a decree for the carrying into effect of said Revalorization Law, entitled "Durchfuhrungs verordnung sum Aufwertungsgesetze," published in the issue of December 5, 1925, of the Reichsgesetzblatt, Teil 1, Number 51 of 1925, a correct English (77) [103] translation of Sections 95, 96, 97 (subsections 1 and 3), 100, 101 (subsections 1 and 3), 102, 103, 104, 105, 111, 114 and 115 of said decree is hereto attached, marked Exhibit "M," and is hereby referred to and made a part of this answer. Said decree of November 29, 1925, has the force and effect of law within the German Republic. Said law of July 16, 1925, and said decree of November 29, 1925, are

hereinafter sometimes referred to as said Revalorization laws.

III.

That the defendant at all times was, and now is, a supervised company under the said insurance laws and valorization laws, and defendant was at all times subject to the direction and control of the German Office of Supervision for Private Insurance with respect to all funds collected from premiums on policies issued in Germany, the disposition of all such funds, the character of investments to be made thereof, and in all other respects, and in accordance with such control and direction and at all such times defendant was required to and did deposit with said office all premium reserves on all of the outstanding insurance policies that were issued within Germany, and in addition was required to and did deposit with said German authorities, from moneys derived from sources other that German policies and German business, a large sum, and invested all thereof in like manner and in German securities payable in the old mark. That at the time of the outbreak of the World War defendant had invested in Germany, principally in bonds and other securities issued by the German government and by the German states and municipalities, regarded then as the highest type of German securities then available, and which investments were approved by the said German authorities, all (78) [104] of the aforesaid funds; that during the World War, and due to the heavy losses growing out of the war mortalities, defendant sent from

other than German courses, to Germany, a large sum to meet such losses.

That the Federal Office of Supervision for Private Insurance, long prior to the commencement of this action, rendered a decision holding that defendant was and is a supervised company within the meaning of the insurance and the valorization laws. Thereafter an appeal from said decision was taken to the German Insurance Board, as provided by the laws of Germany, which on October 25, 1928, rendered a decision holding that the defendant was a supervised insurance company within the meaning of the said valorization law, and the said decree. A true copy of an English translation of said decision is hereto annexed as Exhibit "K," and hereby made a part of this answer. Thereafter, and as provided by Section 74 of the German law relating to private insurance companies, an appeal was taken to the Appellate Division thereby set up to hear such appeals, and on February 13, 1929, the said Appellate Division affirmed the decision of the said Federal Superintendent's Office of Private Insurance and the decision of the said German Insurance Board. A true English translation of the decision of said Appellate Division is hereto annexed, marked Exhibit "L," and hereby made a part hereof. The said last-named decision under German law is final and no appeal can be taken therefrom.

IV.

That each of the policies of insurance hereinbefore referred to is included within the contracts

and obligations covered by said valorization laws and said decree of November (79) [105] 29, 1925. That all of the funds and assets of the defendant aforesaid are now being administered by and under the direction of the said German insurance authorities in accordance with the said laws.

By the provisions of Section 62 of the said valorization laws there is reserved to claimants payable in old marks, who do not come under the provisions of said law, the remedy of recovery to the number of old marks specified in the contract or obligation, or the conversion value thereof in the new mark on the basis of one of the latter for one million million of the former, and such other and further relief as might be given under Section 242 of the German Civil Code to claimants entitled to the benefit of that Act, and no other rights of actions or remedies. For such claims, however, as do come within the said valorization law, including the claims upon which this action is based, the claimant's right of recovery is exclusively under the said law, the determination of which is exclusively with the German insurance authorities, and is not such a right as is enforceable either in the courts of Germany or the courts of any other country. This has been the construction and interpretation given to said laws and decrees promulgated thereunder by the administrative and executive branches of the German government and by the German courts, and is the true interpretation of said laws.

In this connection reference is made to the following decisions of the German courts:

(a) The decision of June 8, 1928, of the Supreme Court of Germany (the highest Court of the German Reich) in the case of Schroter *versus* Alte Gothaer Lebens-Verscherungs Bank, an accurate English translation of which is attached hereto and (80) [106] marked Exhibit "M."

(b) The decision of April 15, 1929, of the Court of Appeals of Munich, in Protective Association of Holders of Foreign Insurance Policies *versus* Swiss Life Insurance Annuity Institute of Zurich, a copy of which is attached to this answer as Exhibit "H."

(c) The decision of the German Court of Appeals of Berlin of July 11, 1928, in the case of Daunert *versus* The Guardian Life Insurance Company of New York, an accurate English translation of which is attached hereto as Exhibit "N."

(d) The decision of July 27, 1926, of the Landsgericht (District Court) of Hamburg, in the case of Blembel *versus* New York Life Insurance Company, in which it was held that a claim upon an insurance policy, substantially similar in its terms to those involved in this action, was governed by the Revaluation Law and Enforcement Ordinance, and that an action thereon in the courts must be dismissed. Among other things the Court said:

> "In so far as the claims for revaluation fall under the Revaluation Law, only the Trustee, and not the defendant is the party against whom the claim may be prosecuted. For under the provisions of the Ordinance, the Trustee has to ascertain the insurances concerned

in a revaluation; his position with regard to the revaluation fund is very much like that of a public receiver in bankruptcy proceedings; and, therefore, the claim has to be asserted against him.

* * * * * * * *

"The amount insured is specifically fixed at Marks 100,000. The provisions of the Revaluation Law, therefore, apply thereto. As has been said above, the plaintiff can in so far prosecute his claim against the Trustee only, as has been appointed or is to be appointed." (81) [107]

(e) The decision of April 25, 1928, of the Landsgericht of Berlin, in the case of Nagel *versus* New York Life Insurance Company. There an application was made by the plaintiff to be allowed, as a poor party, to sue the New York Life Insurance Company upon a policy of insurance. The application was refused, the Court saying:

"The application of the petitioner to be granted the right to sue as a poor party is dismissed because the intended lawsuit appears to have no prospect of success. The opposing party is a foreign Insurance Company under the supervision of the Reich and therefore a claim for revaluation lies only within the purview of and in accordance with the provisions of the Revaluation Act."

(f) The case of Schubert *versus* New York Life Insurance Company, decided February 15, 1927, by the Landsgericht of Berlin. This was an

action upon a life insurance policy, and it was held that it could not be maintained as the relief could only be sought through and under the Revaluation law.

(g) The decision in the case of Gorgas *versus* New York Life, entered on January 9, 1929, and the decision in the cases of H. W. S. Brauer and Herman Gros against the New York Life Insurance Company, of the Supreme Court of Appeals of Berlin, entered on January 31, 1928, and the supplemental opinion in the same matter in the same Court on March 8, 1928.

(h) The decision in the Landsgericht of Hesse, in Darmstadt, entered on February 3, 1928, in the case of Hecht *versus* New York Life Insurance Company, in which it was held that the New York Life Insurance Company was a supervised company, that the claim was upon a policy of insurance which fell within the aforesaid Revaluation law, and that the remedies of the policy-holder must be sought under the Revaluation law. This decision was affirmed on December 18, 1928, by the Hessian Court of (82) [108] Appeals at Darmstadt.

V.

Pursuant to the provisions of said Revaluation law and Enforcement Decree, and as the result of discussions and negotiations carried on between the defendant and the German government, an agreement was reached on February 12, 1930, with regard to the amount of the contribution to be made by the defendant to the revaluation stock or fund to be administered by the Trustee under said

Revaluation law for the exclusive benefit of the holders of German policies issued by the defendant, including the policies mentioned in the amended complaint. That by the terms of said agreement the defendant is assessed and is to contribute from its general funds—that is, funds and property other than the premium reserves upon German insurance policies and other funds turned over by defendant to Kronos as hereinbefore stated—an amount necessary to enable a revaluation of fifteen (15%) per cent of the gold mark value of each insurance policy, including the policies described in the amended complaint. Attached hereto and marked Exhibit "O," is an accurate English translation of the German Federal Insurance Department of Private Insurance, having jurisdiction of the matter, in which said agreement, and the basis and reasons therefor, are stated. That it is the purpose of the defendant, and it is now taking the necessary steps, to conform to said agreement and said decision.

VI.

That by reason of the matters and things herein alleged, this action shold be dismissed and abated, and plaintiff remitted for the enforcement of his rights and remedies to the courts and other tribunals of Germany having jurisdiction in the premises. (83) [109]

FOR A THIRD FURTHER AND SEPARATE ANSWER AND DEFENSE TO EACH AND ALL OF THE CAUSES OF ACTION IN THE AMENDED COMPLAINT.

For a third, further and separate answer and

defense to each and all of the four causes of action in the amended complaint contained, the defendant:

I.

Reaffirms and re-alleges all and singular the matters and things contained in each of the answers to the causes of action set forth in the amended complaint and in the several separate answers and defenses to each of the causes of action contained in the amended complaint, and to the first and second further, and separate answers and defenses to each and all of the causes of action contained in the amended complaint, and by reference makes them a part hereof; and further alleges:

II.

Defendant further alleges that each of the insurance policies on which this action is based was applied for and entered into in Germany; that all payments thereunder were, by the terms of each of said policies, required to be made in the mark currency of that country; that the plaintiff at all times was and now is a citizen, subject and resident of Germany. The defendant is engaged in the transaction of business in Germany, and was at all times mentioned in the pleadings in this case, and during all of said times was and now is subject to processes of and may be sued in the German courts.

The administrative machinery provided for and set up in connection with and for the administration of the valorization laws aforesaid, is now at work and functioning. The Courts of Germany are open and functioning. The plaintiff can have

a fair and impartial hearing of his alleged claims and rights upon said policies of insurance, either in the German courts (84) [110] or before said administrative body.

There are no available compilations of German laws, or reports of decisions of German courts issued in the English language. There is no evidence to be had or found in Oregon relating to this case, and no witnesses in Oregon who can give testimony in the case. All witnesses in and all evidence material to the case are in Germany. The transactions involved in this case occurred in Germany, and were carried forward in the German language, in which language all documents, correspondence and the like connected with the transactions involved in this case were written.

III.

A consideration of this case upon the merits must necessarily put upon this court the burden of familiarizing itself with the jurisprudence of Germany, which involves the examination into and study of many statutory provisions, including Section 242 of the Civil Code; several monetary and banking laws in force in Germany prior to the World War; legislation touching the same subject enacted by Germany during and after the war; the legislation resulting in the practical demonetization of the old mark and the creation of a new mark in 1924; the valorization acts of 1925 and the regulations and decrees passed and put into force under these several acts by executive and administrative officers of the German government; the

extent of the power of the executive and administrative officers to issue such regulations and decrees; the legal effect thereof; also the existence and scope of the judgments of the courts of Germany; the actions, administrative policy and opinions of the administrative and executive officers construing the written and unwritten law of Germany; the usages, (85) [111] customs and unwritten law of Germany; the writings of German jurists and other sources of information.

IV.

The rights of plaintiff, if any, can be tried and determined expeditiously and with very little expense by German tribunals. Should a trial of this case be had in this court the defendant would be put to great expense and inconvenience and be greatly handicapped in the making of its defense because it cannot by any process of this court compel the production of evidence, or the attendance of witnesses or the giving of testimony by persons having knowledge of material facts. This court should not retain jurisdiction, but should abate and dismiss this action and remit the plaintiff to his remedies before the courts or other tribunals of Germany.

WHEREFORE, defendant prays that plaintiff take nothing by this action and that defendant have and recover from plaintiff its costs and disbursements herein.

HUNTINGTON, WILSON & HUNTINGTON,

CLARK & CLARK,

Attorneys for Defendant. (86) [112]

TRANSLATION.

EXHIBIT "A."

From: German
Into: English

No. 1554478

NEW YORK LIFE INSURANCE COMPANY.

The "New York" Life Insurance Company by this policy insures

Age 37 Years

the life of Mr. Ludwig Schnell residing at Breslau, Prussia for a period of 20 years beginning from December 31, 1904, at noon, for the amount of 9,000 Marks D. Rwg. and the Company

Annual premium M477.90

Extra 45.00 M522.90

Mks.D.Rwg.

HEREBY OBLIGATES itself to pay said amount in its Office in Berlin to the legal representative of the insured at the death of the above named insured while this policy is in force.

If however, the insured survives the maturity of the insurance, that is the 31st of December Nineteen hundred and twenty four the amount of 9,000 Marks D. Rwg. will be paid to the insured or his legal successors, and this policy at the same time will cease and determine [113]

This Policy is Issued

First: On the basis of the written application made to the Company.

Second: In conformity with the General Insurance Conditions set forth on the second and third pages of this policy of which the insured declares having received full knowledge and which he acknowledges as an essential part of the present con-

tract as though they were recited at length above the affixed signatures.

Third: In consideration of the first annual premium of 522.90 Marks D. Rwg, having been paid to the Company and under the assumption that a like payment be made in advance on the 31st December of each year during the continuance of this policy, until 20 full year's premiums have been paid.

Revised:

Fourth: With annual participation in profits, as set forth hereinafter.

In Witness Whereof the present contract has been issued by The New York Life Insurance Company and signed by its President, its Secretary, and its General Manager for Europe or its General Secretary for Europe or its Substitute Secretary for Europe on the 7th of February of the year One Thousand nine hundred five.

President:
JOHN A. McCALL.

Secretary:
SEYMOUR M. BALLARD.

Endowment 20 Years

Director General for Europe:
W. E. INGERSOLL.

Annual Participation in profits

Chief Representative for Germany:
G. NIMPTSCH

Berlin, February 7, 1905. [114]

Liberal Policy.

A.————————,
Secretary for Germany

Prussia

99–504

GENERAL INSURANCE CONDITIONS.

I. POWERS OF THE AGENTS.

No agent is authorized, in the name of the Company, to make this or any other insurance contract or to modify it or to keep it from lapsing, to extend the term for the payment of the premium or to bind the Company through any promises or through the acceptance of any communications or declarations. This authority is vested exclusively in the President, the First or Second Vice-President, the Actuary or the Secretary of the Company and is delegated only to the General manager for Europe, the General Secretary for Europe, or the Substitute Secretary for Europe.

II. PAYMENT OF THE FIRST PREMIUM.

The present policy takes effect only after the first premium has actually been paid to the Company and has been accepted by it while the insured is living and in good health.

III. FRACTIONAL PAYMENT OF PREMIUMS.

The premium is always to be considered as payable annually in advance. If however by agreement semi- or quarter-annual payment of premiums has been stipulated, the part of the year's premium that may have remained unpaid at the death of the insured will be considered an indebtedness to the Company under the contract and will be deducted from the amount of insurance due.

IV. SUBSEQUENT PREMIUMS.

The premiums are payable at the Office of the Company in Berlin if no other agreement has been made in writing. However, the premiums may likewise be paid to persons authorized to collect them, but always against receipts bearing the signature of the President, the First or [115] Second Vice-President, or the General Manager or General Secretary for Europe.

V. GRACE PERIOD FOR THE PAYMENT OF THE PREMIUMS.

A thirty-day grace-period is granted for the payment of each premium with the exception of the first. During that grace period the unpaid premium will be considered an indebtedness to the Company, which in case of the death of the insured within the said thirty day period, will be deducted from the insurance amount payable.

VI. NON-PAYMENT OF A PREMIUM.

If a premium is not paid within the thirty days grace period, the insurance ceases by right.

In consequence of such lapse, the premiums paid to the Company are retained by it, if three full years premiums have not been paid.

The policy may be reinstated, provided the insured can prove to the satisfaction of the Company, within six months following the non-payment of a premium, that he is in a condition required for the issuance of a new insurance, and pays the premiums

in arrears with late interest at the rate of 5% per annum.

Should the policy lapse after it has been in force three full years, the insured may avail himself of the provisions set forth in Article VII and in the following Table of Reduced Insurance, Extended Insurance or Cash Surrender Value.

VII. NON-FORFEITURE.

If at the time of lapse the policy has been in force not less than three full years, the same may:

(A) be converted, by endorsement, into a paid-up policy for a reduced amount of insurance, as stated in the following table; or

(B) be purchased by the Company for cash for a sum, the amount of which is likewise stated in the following table.

In either case the insured must, within six months following the due date of the unpaid premium, notify the Company in writing of his choice and return the policy. If the policy has not been reduced or surrendered for its cash value as stated above: [116]

(C) the insurance will automatically be extended for the amount of Marks 9,000 D.Rwg. for the period set forth in the table below, counting from the day to which the premium has been paid in conformity with the contract. The insurance terminates at the end of the said period; if, however, the insured is then still living the amount set forth in paragraph "insurance extension" will be paid in cash.

The paid-up insurance for a reduced amount and

the extended insurance, as specified above, are subject to the conditions of the present policy, however without payment of premiums, without rights to loans, and without participation in the profits, as specified in Article X following.

If at the time of the non-payment of a premium there is any indebtedness to the Company under the policy, such indebtedness (should the insured wish to avail himself of the above provisions of reduction or of the extended insurance) must be repaid to the Company within 30 days following the due date of the said unpaid premium. If such indebtedness has not been repaid, the Company shall consider the policy as automatically lapsed and no longer in force by paying to the insured the cash surrender value, mentioned in this Article under "B," after deduction of all sums due as to principal, interest and expenses. In this latter case the unpaid premium is not considered an indebtedness to the Company.

VIII. WAR RISK.

The present policy covers the War Risk without payment of an extra premium.

IX. INCONTESTABILITY.

Should the death of the insured occur after the present policy has been in force one full year counting from the date of its issue by the Company, the latter cannot contest the payment of the insured amount for any reason whatsoever, provided the premiums have been paid regularly. [117]

X. CASH LOANS ON THE PLEDGE OF THIS POLICY.

After this policy has been in force three full years the Company will grant advances as loans against the value of the said policy. These loans will be granted by the Company, on request of the insured, within the thirty day period, mentioned above in Article V, counting from the beginning of the Fourth or any subsequent insurance year. The loans are subject to the conditions of the loan agreement then in use by the Company. The insured will have the right to specify the amount of the loan to be granted, provided however, that the said amount together with any prior loan then outstanding on the policy, shall not exceed the amount shown in the following table.

Interest at the rate of 5% per annum is to be charged for the loans.

XI. PROFITS.

The present policy is issued, as specified on the first page, with annual participation in the profits of the Company. The said profits are distributed on the anniversary of the policy and may:

A. be withdrawn in cash; or,

(Page 3 of policy)

B. be applied to increase the original amount of insurance.

The profits of the Company under insurances issued with annual participation in profits are ascertained in the following manner: At the end of each year the calculation of the profits and losses for the

totality of policies issued with annual distribution of profits, will be made. The part of the general expenses of the Company which, according to this calculation, is to be charged against policies with annual distribution of profits, is determined in the following manner: the totality of the expenses are divided in two classes, namely (a) the share of the expenses to be borne by the premiums of the first year exclusively and (b) the expenses to be borne by the premiums of the subsequent years; the policies with annual participation in profits are charged with such proportionate part of the total amount of the expenses of the first class, as obtained from the proportion between the [118] premiums of the first year on policies with annual participation in profits and the first year's premiums of the total business of the Company; a like proportionate part of the total amount of the expenses of the second class is charged as obtained from the proportion between the premiums of the subsequent years on policies with annual participation in profits and the premiums for the subsequent years of the total business of the Company.

After the amount of profits for the year relating to policies with annual participation in profits has been ascertained according to this calculation, the Board of Management of the Company may apportion certain sums, taken from the said profits, to a special reserve for instance, reserve fund for war risk, fluctuations in mortality), provided however that the total amount of these sums in the course of a year does not exceed one fourth of the total

profit. The balance of the year's profits (which can never be less than three fourths of the total profits) is thereupon distributed, in cash, among the holders of policies with annual participation in profits on the anniversary dates of such policies in the year following. The share of the various policies in the totality of the dividends apportioned is as follows:

Policies that have been in force one year participate in the proportion of the annual premium;

Policies that have been in force two years participate in the proportion of the annual premium, increased by one sixth;

Policies that have been in force three years participate in the proportion of the annual premium, increased by two sixths and so forth, always increased by one sixth for each subsequent year while the policy is in force.

Policies payable at death with limited payment of premiums on which the premiums have not as yet been paid in full receive their share according to the above stated progressive method, in proportion to the annual premium calculated at the rate for insurance payable at death with premium for life and the age of the insured at issue of the policy, [119] and the policies of that same class which have been paid in full for their original amount, in the proportion of the twentieth part of the single premium for an insurance payable at death, as specified in the printed rates of the Company, calculated at the age of the insured at the end of the business year.

XII. ASSIGNMENTS.

The Company is to be notified of any assignment of the present policy.

XIII. PAYMENT IN THE EVENT OF DEATH.

Should the insured die during the continuance of the insurance, payment is made in the office of the Company in Berlin. The Company however, will deduct any indebtedness to it and especially, as already mentioned in Article III, any unpaid part of the premium for the current year.

Proofs of death are to be submitted on the blanks furnished by the Company for that purpose.

The Company makes payment within sixty days after receipt of proofs of death, which have to contain full information as to the cause of death and identification of the person entitled to collect the amount of insurance.

Should it be found that the age stated by the Insured in his application is not his true age, the Company will pay a sum which corresponds to the amount that the premiums actually paid would have purchased at the correct age of the insured, in accordance with the premium rates.

For the execution of the present contract, the Company designates as legal domicile the Office of its General Representative for the State in which the insurance contract was made.

For all lawsuits that may arise under this contract the Company, as defendant, submits, at the option

of the insured, either to the jurisdiction of the Courts to which its General Representative for the State in which the insurance contract was made is subject, or to the [120] jurisdiction of the Courts to which the agent, through whom the insurance was made, is subject.

XIV. STAMP DUTIES AND TAXES.

The Stamp and Registration fees for policies and other documents, the ones in existence now as well as any taxes and imposts for insurance amounts and insurance premiums that may be imposed in the future, as well as the costs for making payment under the contract are to be borne by the insured or their legal representatives.

TABLE OF LOANS, REDUCED PAID-UP INSURANCE, EXTENDED INSURANCE AND CASH SURRENDER VALUES,

To which the present policy gives the right, according to the foregoing Article VII.

At the Expiration of	Loans	Reduced Paid-up Insurance	Extended Insurance					Cash surrender Values
3 Years	M. 594	M. 1350	3 Yrs.	7	Mo.	(With	M. 0	M. 630
4 "	" 846	" 1800	5 "	8	"	cash	" 0	" 891
5 "	" 1107	" 2250	7 "	9	"	pay-	" 0	" 1170
6 "	" 1413	" 2700	9 "	7	"	ment	" 0	" 1485
7 "	" 1728	" 3150	10 "	6	"	of)	" 0	" 1818
8 "	" 2079	" 3600	11 "	3	"		" 0	" 2187
9 "	" 2466	" 4050	11 "	0	"		" 837	" 2592
10 "	" 2880	" 4500	10 "	0	"		" 1629	" 3124
11 "	" 3321	" 4950	9 "	0	"		" 2439	" 3492
12 "	" 3807	" 5400	8 "	0	"		" 3249	" 4005
13 "	" 4320	" 5850	7 "	0	"		" 4005	" 4545
14 "	" 4878	" 6300	6 "	0	"		" 4734	" 5130
15 "	" 5481	" 6750	5 "	0	"		" 5427	" 5760
16 "	" 6120	" 7200	4 "	0	"		" 6219	" 6435
17 "	" 6813	" 7650	3 "	0	"		" 6957	" 7155
18 "	" 7371	" 8100	2 "	0	"		" 7659	" 7740
19 "	" 7956	" 8550	1 "	0	"		" 8352	" 8361
20 "	"	"	"	"	"		"	"

NEW YORK LIFE
INSURANCE COMPANY.
"NEW YORK" LIFE INSURANCE COMPANY.
HOME OFFICE OF THE COMPANY
346 & 348 Broadway, New York.

Policy No. 1,554,476.
Amount M. 9,000 D. Rwg.
Insurance on the life of
Mr. Ludwig SCHNELL.
General Management for Europe:
1 & 3 Rue Le Peletier, Paris.
General Management for Prussia:
124 Leipziger Strasse, Berlin, W. [122]

EXHIBIT "C."

No. 1501882.

NEW YORK
LIFE
INSURANCE COMPANY.

Age 28 years.

Premium M 1,074.60 D. Rwg.

THE "NEW YORK" LIFE INSURANCE COMPANY BY THE PRESENT POLICY INSURES the life of Martin Loeb, residing in Stuttgart, Wurttenberg, for a period of 20 years, beginning from July 12, 1902 at noon, for the amount of 20,000 marks and the Company

Payable Yearly.

HEREBY AGREES to pay the said amount in its Office in Stuttgart to Legal Representative of insured upon the death of the above insured while this policy is in force. Furthermore, should the

The New York Life Insurance Company is a purely mutual Company with limited liability; the insured members of it cannot be called upon to make any other payments but the ones mentioned in the policy; the Security Fund of the Company as well as all Surplus of it are the exclusive property of the insured.

Revised:

death of the insured occur within the period of 20 years, counting from the date mentioned above as the beginning of the insurance, the Company agrees to pay, in addition of the above mentioned amount of insurance, an additional sum equalling ——— of the premiums paid calculated at the tabular annual rate of premiums. Or, should the insured still be living at the expiration of the insurance period, namely, on July 12, 1922, the amount of M 20,000 D. Rwg. will then be paid to the insured or his legal representative and, at the same time, the policy shall cease and determine.

THIS POLICY IS ISSUED

FIRST: On the basis of the written application made to the Company.

SECOND: In conformity with the Conditions set forth on the second and third pages of this policy of which the insured declares having received full [123] knowledge and which he acknowledges as an essential part of the present contract as though they were enumerated in detail above the signatures affixed.

THIRD: In consideration that the first ——— annual premium in the amount of 1,074.60 M. D. Rwg. has been paid to the Company and that a like payment be made in advance on 12th day of July of each year during the continuance of this policy until 20 full year's premiums have been paid.

IN WITNESS WHEREOF, the NEW YORK LIFE INSURANCE COMPANY has issued and signed the present contract through its President, its Secretary and its General Manager for Europe

or its General Secretary for Europe or its Substitute Secretary for Europe on the July 20, of the year One Thousand Nine Hundred and Two.

C Endowment Insurance for 20 years.

President:

JOHN A. McCALL.

Secretary:

Return of premiums within 20 years.

CHAS. C. WHITNEY.

General Agent for Kingdom of Wurtenberg:

20 year Accumulation of Profit Period

OTTO (Signature illegible).

Secretary for Europe,

HUNGARY.

A. TAUCHE.

The 14th day July of the year 1902 at Stuttgart.

99—322 [124]

Page 2.

SPECIAL CONDITIONS

MODES OF SETTLEMENT AT THE END OF THE ACCUMULATION OF PROFITS' PERIOD.

The present policy is issued with accumulation of profits during a period of 20 years ending on 12th of July, One Thousand Nine Hundred 22. If the insured is living on the stated day, at noon, and all premiums due have been paid in full, the Company then apportions the profits to the insured or his legal representatives, and the policy, at the same time, will then be redeemed for its total value under one of the following three Modes of Settlement:

(1) In Cash; or

(2) In form of a Life Annuity; or

(3) In form of a Paid-up Insurance without participation in profits and payable at death only; in order to enjoy this privilege, the insured must prove to the satisfaction of the Company that he is in the condition required for the issuance of such an insurance.

THE COMPANY GUARANTEES THAT THE TOTAL CASH SURRENDER VALUE OF THIS POLICY AT THE END OF THE ACCUMULATION OF PROFITS' PERIOD SHALL NOT BE LESS THAN 20,000 Mark D. Rwg. THE TOTAL CASH SURRENDER VALUE COMPRISES, IN ADDITION TO THIS GUARANTEED MINIMUM AMOUNT, THE AMOUNT OF PROFITS THEN APPORTIONED BY THE COMPANY TO THE POLICY.

If this policy is in force at the end of the Accumulation of Profits' period, the Company notifies the insured or his legal representatives of the results obtained under each of the mentioned Modes of Settlement.

Before the expiration of the Accumulation of Profits' Period, no dividends will be apportioned or paid and the Company shall not be compelled, before that time, to give any information regarding the results of the Accumulation. [125]

CASH LOANS ON SECURITY AND PLEDGING OF THIS POLICY.

If the premiums have been paid for three full years, the Company will grant loans on account

of the value of this policy. Such loans will be granted by the Company upon demand of the insured on the anniversaries of the policy, within the 30-day grace period and are subject to the conditions of the Loan Agreement in use by the Company at the time the loan is granted. The amount of the loan is left to the option of the insured on condition, however, that this amount together with any loan and interest outstanding at the time of the application for the said loan shall not exceed the maximum amount set forth in the table below. Interest at the rate of 5% per annum will be charged on the loans.

NON-FORFEITURE.

THIS POLICY IS NON-FORFEITABLE AFTER IT HAS BEEN IN LEGAL FORCE ONE FULL YEAR.

If one of the subsequent premiums remains unpaid, the policy will be converted, by endorsement, into a paid-up insurance for the corresponding reduced amount set forth in the table below. For that purpose, the insured must, within six months following the due date of the unpaid premium, make a written request to the Company and return the policy. THIS PAID-UP INSURANCE IS PAYABLE EITHER UPON THE DEATH OF THE INSURED BEFORE THE EXPIRATION OF THE ENDOWMENT PERIOD (AT DEATH OR AT SURVIVAL) OR AT SURVIVAL AT THE END OF THAT PERIOD. If the policy has not been converted in the manner

mentioned, the insurance will be considered, by rights, as extended for the amount of 20,000 Marks and for the period set forth in the table below, counting from the day to which the premium has been paid contractually. AT THE END OF THIS PERIOD, THE POLICY SHALL LOSE ITS FORCE BUT IF THE INSURED IS STILL LIVING AT THAT TIME, THE AMOUNT SET FORTH IN THE LAST COLUMN OF THE TABLE BELOW SHALL BE PAID IN CASH. The above-mentioned paid-up insurance for a reduced amount as well as the extended insurance remain subject to the conditions of the present policy, however, without [126] further payment of premiums, without right to loans, without participation in profits and without eventual return of premiums.

TABLE OF LOANS, REDUCED PAID-UP INSURANCE AND EXTENDED INSURANCE, to which the present policy gives the right provided that the premiums have been paid pursuant to the contract and that with regard to the last two columns no amount is due the Company under the policy.

	LOANS	REDUCED PAID-UP INSURANCE counting from the end of the year stated in the First Column	EXTENDED INSURANCE Counting from the end of the year stated in the First Column	(With Cash Payment of.)
1st Year	M	M	0 Years 2 Months	0
2nd "		1500	4 " 10 "	0
3rd "	M 18.60	3000	9 " 9 "	0
4th "	25.40	4000	15 " 4 "	0
5th "	33.80	5000	15 " 0 "	1940
6th "	43.20	6000	14 " 0 "	3400
7th "	51.20	7000	13 " 0 "	4820
8th "	59.80	8000	12 " 0 "	6220
9th "	68.60	9000	11 " 0 "	7580
10th "	77.60	10000	10 " 0 "	8860
11th "	87.00	11000	9 " 0 "	10100
12th "	96.80	12000	8 " 0 "	11280
13th "	107.00	13000	7 " 0 "	12400
14th "	117.60	14000	6 " 0 "	13480
15th "	128.60	15000	5 " 0 "	14520
16th "	140.00	16000	4 " 0 "	15660
17th "	151.80	17000	3 " 0 "	16800
18th "	164.20	18000	2 " 0 "	17900
19th "	177.00	19000	1 " 0 "	18960
20th "	190.40			
21st " 26th				
22nd " 27th				
23rd " 28th				
24th " 29th				
25th " 30th				

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Page 3.

GENERAL CONDITIONS.

This Policy is free from all restrictions regarding residence, occupation, travel, cause of death, time of death and place of death. In case the insured is called for military duty on land or sea in time of peace or time of war, no special permission nor payment of an extra premium is required.

INCONTESTABILITY.

This Policy is incontestable from the day of its issue.

GRACE FOR THE PAYMENT OF THE PREMIUMS.

A thirty days' grace period is granted for the payment of each premium with the exception of the first. During these thirty days the unpaid premium is considered an indebtedness to the Company which, should the death of the insured occur within the said thirty-day grace period, is to be deducted from the amount of insurance payable.

REINSTATEMENT AFTER NON-PAYMENT OF A PREMIUM.

The Policy may be reinstated provided the insured can prove to the satisfaction of the Company, within 5 years following the nonpayment of a premium and within the Accumulation of Profit Period, that he is in a condition required for the issuance of an insurance and the premiums in arrears together with interest for the delay, at the rate of 5% per annum, be paid.

POWERS OF THE AGENTS.

No agent is authorized, in the name of the Company, to make this or any other insurance contract or to modify it or to keep it from lapsing, to extend the term for the payment of a premium or to bind the Company through any promises or through the acceptance of any communications or declarations. This authority is vested exclusively in the President, the First or Second Vice-President, the Actuary and the Secretary of the Company and is delegated only to the General Manager for Europe, the General Secretary for Europe or the Substitute Secretary for Europe.

PAYMENT OF THE FIRST PREMIUM.

The present policy takes effect only after the first premium [128] has actually been paid to the Company and has been accepted by it while the insured is living and in good health.

FRACTIONAL PAYMENT OF PREMIUMS.

The premium is always to be considered as payable annually in advance. If however by agreement semi or quarter annual payments of premiums has been stipulated, the part of the year's premium that may have remained unpaid at the death of the insured will be considered an indebtedness to the Company under the contract and will be deducted from the amount of insurance due.

SUBSEQUENT PREMIUMS.

The premiums are payable at the Office of the Company at Stuttgart unless otherwise agreed in

writing. However, they may also be paid to the persons entrusted with the collection of same but always only against a receipt signed by the President, the First or Second Vice-President, the General Manager for Europe or the General Secretary for Europe.

DISCONTINUANCE OF PREMIUM PAYMENTS.

In consequence of the non-payment of a premium within 30 days after due date, the insurance shall cease by rights.

If the policy has been in force one full year, it shall be entitled to the benefits of the Non-Forfeiture Provisions set forth elsewhere; if however, it should have lapsed within the first year, these provisions do not apply to it.

If at the time of default of a premium there is an indebtedness to the Company under the Policy (if the insured wants to avail himself of the Non-Forfeiture Provisions set forth in the preceding paragraph), such indebtedness must have been repaid within the thirty days following the due date of the unpaid premium. If such repayment is not made, the Company will consider the policy as automatically forfeited and hold same ineffective by paying to the insured the then surrender value, to which he is entitled after deduction of the amount of the main debt to the Company plus interest and charges. [129]

ASSIGNMENTS.

The Company must be notified of any assignment of this Policy.

PAYMENT AFTER DEATH.

Should the insured die within the insurance period, payment will be made at the office of the Company at Stuttgart. The Company, however, will deduct any indebtedness due it and especially, as mentioned above, any part of the premium still unpaid for the current year.

The proofs must be drawn up in accordance with the blanks made available for this purpose by the Company.

The Company makes the payment within 60 days after receipt of the proofs evidencing the death and the cause of it, which proofs must also support the claims of those authorized to collect the insurance amount.

Should it be found that the age stated by the insured in the application on which this contract is based is incorrect and differs from his true age, a sum will be paid which corresponds to the amount that the premium actually paid would have purchased at the true age of the insured in accordance with the premium rates.

TAXES AND FEES.

All stamp dues and all other legal dues on policies and other documents, all taxes and dues whether existing at the present time or that may be imposed hereafter on insurance amounts or insurance premiums as also any expenses and charges which may possibly accrue in connection with the contractual

settlement, must be borne by the insured or his legal successors.

LEGAL DOMICILE.

For the performance of the present contract, the courts in Stuttgart alone are competent; as legal domicile for the Company there is stipulated its Office at Stuttgart and for the insured and the beneficiary, the place stipulated in the application for the insurance. [130]

Page 4.

ABSTRACT FROM THE APPLICATION FOR INSURANCE
to the
NEW YORK LIFE INSURANCE COMPANY.

1. Full name and surname of the person proposed for the insurance: Martin Loeb.

4 B. Born on 12 July 1874.

I, the undersigned, agree that my above statements as well as my statements to the examining physician of the Company serve as a basis for the intended contract between the Company and myself; I warrant them to be complete and true whether written by my own hand or not and relying on these declarations and answers the Policy is to be issued.

I agree that in determining the part of the profits on the Policy issued on the basis of the present application, the principles and methods adopted by the Company for such distribution be used, and I

hereby consent, in advance, for myself, as well as for any other person who shall have or claim any interest in the proposed contract to such determination of profits.

Finally, I likewise agree that I am bound to this application towards the Company for 60 days, counting from to-day and that the Company has therefore the privilege to express itself as to the acceptance or rejection of the present application within that period.

Dated 30 April, 1902.

Signature of the Applicant: MARTIN LOEB.

"NEW YORK"
LIFE INSURANCE COMPANY.

HOME OFFICE:

346 & 348, BROADWAY, NEW YORK.

General Management for Europe:
1 & 3, Rue Le Peletier, Paris.

INSURANCE ON THE LIFE

Of ————————.

————————

POLICY No. ————.

AMOUNT: ————————. [131]

EXHIBIT "D."

NEW YORK LIFE INSURANCE COMPANY.

No. 1505347

Age 27 Years

The "New York" Life Insurance Company by this policy insures the life of Mr. Hermann Kaiser Bluth, residing at Coln (Cologne), Prussia, for a period of 20 years beginning from September 24, 1902, at noon, for the amount of 30,000 Marks D. Rwg., and the Company

HEREBY OBLIGATES itself to pay said amount in its Office in Berlin to Mrs. Maria Kaiser Bluth nee Heinfeld, wife of the insured, if she survives the insured, otherwise to his legal representatives at the death of the above-named insured while this policy is in force.

Annual Premium

M.1524.30 D. Rwg.

If however, the insured survives the maturity of the insurance, that is the 24th of September, Nineteen Hundred and twenty-two, the amount of 30,000 Marks D. Rwg. will be paid to Mrs. Marie Kaiser Bluth nee Heinfeld, wife of the insured, if she survives him or his legal representatives, and this policy at the same time will cease and determine.

This policy is issued

First: On the basis of the written application made to the Company.

Second: In conformity with the General Insurance Conditions set forth on the second and third pages of this policy of which the insured declares having received full knowledge and which he acknowledges as an essential part of the present con-

tract as though they were recited at length above the affixed signatures.

Revised

Third: In consideration of the first annual premium of 1524 Marks 30 Pfennig D. Rwg. having been paid to the Company and under the assumption that a like payment be made in advance on the 24th of September of each year during the continuance of this policy until 20 [132] full year's premiums have been paid.

Fourth: With annual participation in profits, as set forth heretofore.

IN WITNESS WHEREOF the present contract has been issued by the New York Life Insurance Company and signed by its President, its Secretary and its General Manager for Europe or its General Secretary for Europe or its Substitute Secretary for Europe on the 24th day of September of the year One Thousand Nine Hundred and two.

President:

JOHN A. McCALL.

Berlin, September 27, 1902,

Endowment 20 Years

Secretary:

CHAS. C. WHITNEY.

Annual Participation in Profits

Director General for Europe:

A. TAUCHE.

Liberal Policy

Chief Representative for Prussia:

Prussia

G. NIMPTSCH.

99–504. [133]

EXHIBIT "E."

TRANSLATION.

From: German
Into: English

No. 2508291

NEW YORK LIFE
INSURANCE COMPANY.

Age 32 Years.

THE "NEW YORK" LIFE INSURANCE COMPANY BY THE PRESENT POLICY INSURES the life of Wilhelm Eduard Stadelmeyer residing in Pforzheim, Baden, Germany, for a

Premium

period of twenty-five years (25), beginning from December 7, 1903, at noon, for the amount of 10,-

M.413.10 D. Rwg.

000 Marks and the Company

HEREBY AGREES to pay the said amount in its office in Mannheim to the legal representative of the insured upon the death of the above insured while this policy is in force. Or, should the insured still be living at the expiration of the insurance period, namely on December 7, 1928, the amount of 10,000 Marks D. Rwg. will then be paid to the insured or his legal representative and, at the same time, the policy shall cease and determine.

Payable Yearly

The New York Life Insurance Company is a purely mutual Company with limited liability; the insured members of it cannot be called upon to make any other payments but the ones mentioned in the policy; the Security Fund of the Company as well as all Surplus of it are the exclusive right of the insured.

THIS POLICY IS ISSUED

FIRST: On the basis of the written application made to the Company.

SECOND: In conformity with the conditions set forth on the second and third pages of this policy of which the insured declares having received full knowledge and which he acknowledges

as an essential part of the present contract as though they were recited at length in detail above the signatures hereto affixed.

Revised.

THIRD: In consideration that the first annual premium in the amount of 413.10 Marks has been paid to the Company and that a like payment be made in advance on December Seventh of each year during the continuance of this policy until twenty-five (25) full year's premiums have been paid.

Endowment Insurance for 25 years

IN WITNESS WHEREOF, the present contract has been issued by the "New York" Life Insurance Company and signed [134] by its President, its Secretary and its General Manager for Europe or its General Secretary for Europe or its Substitute Secretary for Europe on the Seventh day of December of the year One Thousand Nine Hundred and Three.

20 year Accumulation of Profits' Period.

President:
JOHN A. McCALL.

Secretary:
CHAS C. WHITNEY.

Universal-Policy

General Director for Europe:
W. E. INGERSOLL.

HUNGARY.

Chief Representative for Germany:
G. NIMPTSCH.

Actuary for Germany:
G. BOHLMANN.

Berlin, December 7, 1903.

99–315 [135]

SPECIAL CONDITIONS.

MODES OF SETTLEMENT AT THE END OF THE ACCUMULATION OF PROFITS' PERIOD.

The present policy is issued with accumulation of profits during a period of Twenty (20) years ending on December 7, 1923. If the insured is living on the stated day, at noon, and all premiums due have been paid in full, the Company then apportions the profits to the insured or his legal representatives, and the policy, at the same time, will then be either kept in force or cancelled under one of the following six Modes of Settlement:

FIRST: The policy may be left in force and the profits withdrawn

(1) In cash; or

(2) In form of an annuity, payable in cash or applicable to the reduction of the premium; or

(3) In form of a paid-up Endowment (payable at death and at survival) additional insurance; in this case, in order to enjoy this privilege, the insured must prove to the satisfaction of the Company that he is in the condition required for the issuance of an additional insurance.

SECOND: The policy may be surrendered against receipt of its total value.

This policy surrender is regulated in one of the following ways:

(4) In cash; or

(5) in form of a Life Annuity; or

(6) in form of a paid up insurance without par-

ticipation in profits and payable at death only; in this case, in order to enjoy this privilege, the Insured must prove to the satisfaction of the Company that he is in the condition required for the issuance of such an insurance.

THE COMPANY GUARANTEES THAT THE TOTAL CASH SURRENDER VALUE OF THIS POLICY AT THE END OF THE ACCUMULATION OF PROFITS' PERIOD SHALL NOT BE LESS THAN ——— THE TOTAL CASH [136] SURRENDER VALUE COMPRISES, IN ADDITION TO THIS GUARANTEED MINIMUM AMOUNT, THE AMOUNT OF PROFITS THEN APPORTIONED BY THE COMPANY TO THE POLICY.

If this policy is in force at the end of the Accumulation of Profits' Period, the Company notifies the insured or his legal representatives of the results obtained under each of the mentioned Modes of Settlement.

If within thirty days after publication of these results the Company has not been informed of the option made, the second (2) above mentioned Mode of Settlement is considered by right as chosen and in conformity with this the profits, apportioned to the policy, are converted by the Company into an Annuity.

Before the expiration of the Accumulation of Profits' Period, no dividends will be apportioned or paid and the Company shall not be compelled, before that time, to give any information regarding the results of the Accumulation.

If the policy is kept in force after expiration of the Accumulation Period in conformity with any one of the first three above-mentioned Modes of Settlements, and if the Premiums are paid in conformity with the contract, the apportionment of profit will be made thereafter at the end of each next five-years period, and at the end of the same the policy can in conformity with any one of the six above-mentioned Modes of Settlement either be kept in force or cancelled. Moreover the insured, or his legal representative can at the end of the Accumulation Period or any one of the next five years periods, demand by means of a written request that the future profits be apportioned every year, instead of every fifth year; in this case the apportionment of profits takes place thereafter in conformity with the request expressed.

CASH LOANS ON SECURITY AND PLEDGING OF THIS POLICY.

If the Premiums have been paid for three full years, the Company [137] will grant loans on account of the value of this policy. Such loans will be granted by the Company upon demand of the insured and are subject to the conditions of the Loan Agreement in use by the Company at the time the loan is granted. The amount of the loan is left to the option of the insured on condition, however, that this amount together with any loan and interest outstanding at the time of the application for the said loan shall not exceed the maximum amount set forth in the Table below. Interest at

the rate of 5% per annum will be charged on the Loans.

NON-FORFEITURE.

THIS POLICY IS NON-FORFEITABLE AFTER IT HAS BEEN IN LEGAL FORCE ONE FULL YEAR.

If one of the subsequent premiums remains unpaid, the policy will be converted, by endorsement, into a paid-up insurance for the corresponding reduced amount set forth in the Table below. For that purpose, the insured must, within six months following the due date of the unpaid premium, make a written request to the Company and return the policy. THIS PAID-UP INSURANCE IS PAYABLE EITHER UPON THE DEATH OF THE INSURED BEFORE THE EXPIRATION OF THE ENDOWMENT PERIOD (AT DEATH OR AT SURVIVAL) OR AT SURVIVAL AT THE END OF THAT PERIOD. If the policy has not been converted in the manner mentioned, the insurance will be considered, by rights, as extended for the amount of 10,000 Marks and for the period set forth in the Table below, counting from the day to which the premium has been paid in accordance with the contract. AT THE END OF THIS PERIOD, THE POLICY SHALL LOSE ITS FORCE BUT IF THE INSURED IS STILL LIVING AT THAT TIME, THE AMOUNT SET FORTH IN THE LAST COLUMN OF THE TABLE BELOW, SHALL BE PAID IN CASH. The above-mentioned paid-up insurance for a reduced amount as well as the

extended insurance remain subject to the conditions of the present policy, however, without further payment of premiums, without right to loans, and without participation in profits. [138]

TABLE OF LOANS, REDUCED PAID-UP INSURANCE AND EXTENDED INSURANCE, to which the present policy gives the right provided that the premiums have been paid pursuant to the contract and that with regard to the last two columns no amount is due the Company under the Policy.

	LOANS.		REDUCED PAID-UP INSURANCE counting from the end of the year stated in the first column.				EXTENDED INSURANCE Counting from the end of the year stated in the first column.
							(With Cash Payment of)
1st Year	0	0	—	Years	2	Months	0
2nd "	0	600	1	"	5	"	0
3rd "	660	1200	2	"	10	"	0
4th "	900	1600	4	"	6	"	0
5th "	1220	2000	6	"	2	"	0
6th "	1570	2400	7	"	5	"	0
7th "	1860	2800	8	"	10	"	0
8th "	2170	3200	10	"	2	"	0
9th "	2490	3600	11	"	4	"	0
10th "	2820	4000	12	"	7	"	0
11th "	3160	4400	13	"	5	"	0
12th "	3510	4800	13	"	0	"	630
13th "	3870	5200	12	"	0	"	1410
14th "	4260	5600	11	"	0	"	2230
15th "	4640	6000	10	"	0	"	3020
16th "	5040	6400	9	"	0	"	3770
17th "	5470	6800	8	"	0	"	4530
18th "	5900	7200	7	"	0	"	5220
19th "	6360	7600	6	"	0	"	5920
20th "	6840	8000	5	"	0	"	6590
21st "	7320	8400	4	"	0	"	7320
22nd "	7830	8800	3	"	0	"	8040
23rd "	8370	9200	2	"	0	"	8710
24th "	8930	9600	1	"	0	"	9370
25th "	9520						

[139]

GENERAL CONDITIONS.

This Policy is free from all restrictions regarding residence, occupation, travel, cause of death, time of death and place of death. In case the insured is called for military duty on land or sea in time of peace or time of war, no special permission nor payment of an extra premium is required.

INCONTESTABILITY.

This policy is incontestable from the date of its issue.

GRACE PERIOD FOR THE PAYMENT OF THE PREMIUMS.

A thirty days' grace period is granted for the payment of each premium with the exception of the first. During these thirty days the unpaid premium is considered an indebtedness to the Company which, should the death of the insured occur within the said thirty day grace period, is to be deducted from the amount of insurance payable.

REINSTATEMENT AFTER NON-PAYMENT OF A PREMIUM.

The Policy may be reinstated provided the insured can prove to the satisfaction of the Company, within 5 years following the non-payment of a premium and within the Accumulation of Profit Period, that he is in a condition required for the issuance of an insurance and the premiums in arrears together with interest for the delay, at the rate of 5% per annum, be paid.

POWERS OF THE AGENTS.

No agent is authorized, in the name of the Company, to make this or any other insurance contract or to modify it or to keep it from lapsing, to extend the term for the payment of a premium or to bind the Company through any promises or through the

acceptance of any communications or declarations. This authority is vested exclusively in the President, the First or Second Vice-President, the Actuary and the Secretary of the Company and is delegated only to the General Manager for Europe, the General Secretary for Europe or the Substitute Secretary for Europe. [140]

PAYMENT OF THE FIRST PREMIUM.

The present policy takes effect only after the first premium has actually been paid to the Company and has been accepted by it while the insured is living and in good health.

FRACTIONAL PAYMENT OF PREMIUMS.

The premium is always to be considered as payable annually in advance. If however by agreement semi or quarter annual payment of premiums has been stipulated, the part of the year's premium that may have remained unpaid at the death of the insured will be considered an indebtedness to the Company under the contract and will be deducted from the amount of the insurance due.

SUBSEQUENT PREMIUMS.

The premiums are payable at the office of the Company at Mannheim unless otherwise agreed in writing. However they may also be paid to the persons entrusted with the collection of same but always only against a receipt signed by the President, the First or Second Vice-President, the General Manager for Europe or the General Secretary for Europe.

DISCONTINUANCE OF PREMIUM PAYMENTS.

In consequence of the non-payment of a premium within 30 days after due date, the insurance shall cease by rights.

If the policy has been in force one full year, it shall be entitled to the benefits of the Non-Forfeiture Provisions set forth elsewhere; if however, it should have lapsed within the first year, these provisions do not apply to it.

If at the time of non-payment of a premium there is an indebtedness to the Company under the Policy (if the insured wants to avail himself of the Non-Forfeiture provisions set forth in the preceding paragraph), such indebtedness must have been repaid within the thirty days following the due date of the unpaid premium. If such repayment is not made, the Company will consider the policy as automatically forfeited and hold same ineffective by paying to the insured the surrender value, to which he is entitled at that time after deduction [141] of the principal plus interest and charges.

ASSIGNMENTS.

The Company must be notified of any assignment of this Policy.

PAYMENT AFTER DEATH.

Should the insured die within the insurance period, payment will be made at the Office of the Company at Mannheim. The Company however, will deduct any indebtedness due it and especially,

as mentioned above, any part of the premium still unpaid for the current year.

The proofs must be drawn up in accordance with the blanks made available for this purpose by the Company.

The Company makes the payment within 60 days after receipt of the proofs evidencing the death and the cause of it, which proofs must also support the claims of those authorized to collect the insurance amount.

Should it be found that the age stated by the insured in the application on which this contract is based is incorrect and differs from his true age, a sum will be paid which could have been insured in accordance with the tabular rate at the true age, for the premiums actually paid.

TAXES AND FEES.

All stamp dues and all other legal dues on policies and other documents, all taxes and dues whether existing at the present time or that may be imposed hereafter on insurance amounts or insurance premiums as well as any expenses and charges which may possibly accrue in connection with all payments under contracts, must be borne by the insured or his legal representatives.

LEGAL DOMICILE.

For the performance of the present contract, the Courts in Karlsruhe alone are competent; as legal domicile for the Company at its Office at Mannheim is stipulated and for the insured and the beneficiary, the place determined in the application for insurance. [142]

ABSTRACT FROM THE APPLICATION FOR INSURANCE
to the
NEW YORK LIFE INSURANCE COMPANY.

1. Full name and surname of the person proposed for the insurance: Wilhelm Eduard Stadelmeyer.

---

4. B. Born on July 31, 1871.

I, the undersigned, agree that my above statements as well as my statements to the examining physician of the Company serve as a basis for the intended contract between the Company and myself: I warrant them to be complete and true whether written by my own hand or not and relying on these declarations and answers the Policy is to be issued.

I agree that in determining the part of the profits on the Policy issued on the basis of the present application, the principles and methods adopted by the Company for such distribution be used, and I hereby consent, in advance, for myself, as well as for any other person who shall have or claim any interest in the proposed contract to such determination of profits.

Finally, I likewise agree that I am bound to this application towards the Company for 60 days, counting from today and that the Company has therefore the privilege to express itself as to the acceptance or rejection of the present application within that period.

Dated at Pforzheim, December 3, 1903.
Signature of Applicant:
WILH. STADELMEYER. [143]

"NEW YORK"
LIFE INSURANCE COMPANY.
HOME OFFICE:
346 & 348 BROADWAY, NEW YORK
General Management for Europe:
1 & 3, Rue Le Peletier, Paris.
INSURANCE ON THE LIFE
of Wilhelm Eduard Stadelmeyer

Policy No. 2508291

Amount 10,000 Marks D. Rwg.

General Management for Hungary:
9–11 Erzsebet-Korut,
Budapest. [144]

State of Oregon,
County of Multnomah,—ss.

I, R. A. Durham, being first duly sworn, depose and say:

That I am the statutory agent and attorney-in-fact in the State of Oregon for the defendant in the above-entitled action. That said defendant is a corporation organized in and having its principal office and place of business in the State of New York. I am familiar with the contents of the foregoing answer and verily believe the same to be true. That this verification is made by me for the reason

that all of the officers of the corporation are absent from and nonresidents of the State of Oregon.

R. A. DURHAM.

Subscribed and sworn to before me on this 23d day of April, 1930.

[Seal] B. S. HUNTINGTON,
Notary Public for State of Oregon.

My commission expires: Jan. 7, 1932.

Filed April 24, 1930. [145]

AND AFTERWARDS, to wit, on the 3d day of June, 1930, there was duly filed in said court a reply, in words and figures as follows, to wit: [146]

[Title of Court and Cause—Cause No. L.–10,535.]

REPLY.

Comes now the plaintiff and, for reply to the answer of defendant, admits, denies and alleges as follows:

I.

Denies each and every allegation contained in the twelve paragraphs of denials of the first cause of action, which denials are set out in pages 1 to 4, inclusive, of said answer.

II.

Denies each and every allegation contained in the twelve paragraphs of denials of the second cause of action, which denials are set out in pages 17 to 21, inclusive, of said answer.

III.

Denies each and every allegation contained in the twelve paragraphs of denials of the third cause of action, which denials are set out on pages 34 to 38, inclusive, of said answer.

IV.

Denies each and every allegation contained in the ten paragraphs of denials of the fourth cause of action, which denials are set out on pages 52 to 56, inclusive, of said answer.

V.

Denies each and every allegation contained in said answer, except such allegations thereof as are in this reply expressly admitted. [147]

And for reply to the first and separate answer and defense to the first cause of action, being that matter set out on pages 7 to 11, inclusive, of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and IV thereof.

II.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph II thereof, except that it is admitted that on February 7, 1905, defendant was authorized to transact the business of issuing the life insurance policies mentioned in the second amended complaint and in the answer.

III.

Plaintiff admits Paragraph III thereof, except that it is denied that the endowment or the profits provided for in the policy referred to in the second amended complaint and in the answer, or either of them, were payable in Germany; and denies that defendant since January 1, 1922, has been or is now authorized to do or transact business in Germany, or since said date has maintained or does now maintain an office or agent there, or since said time was or now is subject to the jurisdiction of the German Courts or other German Civil authorities.

And for reply to the second further and separate answer and defense to the first cause of action, being that matter set out on pages 12 to 16, inclusive, of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and V thereof. [148]

II.

Admits Paragraph II thereof except that it is denied that said policy was, in all or any respects, to be performed in Germany.

III.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph III thereof, except it is admitted said policy contains the provisions quoted in said Paragraph III and that at the time of the issuance of said policy defend-

ant had an office and agent at Berlin, Germany, and was then subject to the jurisdiction of the German Courts sitting therein.

IV.

Plaintiff admits the first 18 lines of Paragraph IV thereof except it is denied that since January 1, 1922, defendant has maintained or had or does now maintain or have an office or general representative or any agent whatever at Berlin, Germany, or elsewhere in Germany.

Plaintiff denies each and every allegation contained in the remainder of said Paragraph IV thereof.

And for reply to the first further and separate answer and defense to the second cause of action, being the matter set out on pages 22 to 26, inclusive, of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and IV thereof.

II.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph II thereof, except that it is admitted that on July 14, 1902, defendant was authorized to transact the business of issuing the life insurance policies mentioned in [149] the second amended complaint and in the answer.

III.

Plaintiff admits Paragraph III thereof, except

that it is denied that the endowment or profits provided for in the policy referred to in the second amended complaint and in the answer, or either of them, were payable in Germany; and denies that defendant since January 1, 1922, has been or is now authorized to do or transact business in Germany, or since said date has maintained or does now maintain an office or agent there, or since said time was or now is subject to the jurisdiction of the German Courts or other German Civil authorities.

And for reply to the second further and separate answer and defense to the second cause of action, being that matter set out on pages 27 to 31, inclusive, of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and V thereof.

II.

Admits Paragraph II thereof, except that it is denied that said policy was, in all or any respects, to be performed in Germany.

III.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph III thereof, except it is admitted that said policy contains the provision quoted in said Paragraph III.

IV.

Plaintiff admits the first 17 lines of Paragraph

IV thereof except it is denied that since January 1, 1922, defendant has maintained or had or does now maintain or have an office or general representative or any agent whatever in Germany. [150]

Plaintiff denies each and every allegation contained in the remainder of said Paragraph IV thereof.

And for reply to the third further and separate answer and defense to the second cause of action, being that matter set out on pages 32 and 33 of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and III thereof.

II.

Admits Paragraph II thereof.

And for reply to the first further and separate answer and defense to the third cause of action, being that matter set out on pages 39 to 43, inclusive, of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and IV thereof.

II.

Plaintiff denies that he has any knowledge or information as to the truth of any of the allegations contained in Paragraph II thereof, except that it is admitted that on September 27, 1902, defendant was authorized to transact the business of issuing

the life insurance policies mentioned in the second amended complaint and in the answer.

III.

Plaintiff admits Paragraph III thereof, except that it is denied that the endowment or the profits provided for in the policy referred to in the second amended complaint and in the answer, or either of them, were payable in Germany; and denies that defendant since January 1, 1922, has been or now is authorized to do or [151] transact business in Germany, or since said date has maintained or does now maintain an office or agent there, or since said time was or now is subject to the jurisdiction of the German courts or other German civil authorities. And plaintiff denies that Exhibit "D" attached to said answer is a correct translation into the English language in this:

The clause on the first page of said Exhibit "D" which in the said exhibit reads as follows:

> "If however the insured survives the maturity of the insurance, that is the 24th of September Nineteen Hundred and twenty-two; the amount of 30,000 marks D. Rwg. will be paid to Mrs. Marie Kaiser Bluth nee Heinfeld, wife of the insured, if she survives him or his legal representatives, and this policy at the same time will cease and determine,"

is incorrectly translated in that it should read if correctly translated, as follows:

> "If, however, the insured survives the maturity of the insurance, that is the 24th of Sep-

tember, 1922, the amount of 30,000 Marks D. Rwg. will be paid to Mrs. Marie Kaiser Bluth, nee Heinfeld, wife of the insured, and in case of her death then to the insured's legal representatives, and this policy at the same time will cease and determine."

And for reply to the second further and separate answer and defense to the third cause of action, being that matter set out on pages 44 to 48 inclusive of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and V thereof. [152]

II.

Admits Paragraph II thereof, except that it is denied that said policy was, in all or any respects, to be performed in Germany. And except that it is denied that Exhibit "D" is a correct translation into English of said policy. The facts respecting said incorrect translation, are as alleged in Paragraph III of the third separate cause of action in the second amended complaint, and in Paragraph III of the reply to the first further and separate answer and defense to the third cause of action.

III.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph III thereof, except that it is admitted said policy

contains the provision quoted in said Paragraph III and that at the time of the issuance of said policy defendant had an office, a general representative and an agent at Berlin, Germany, and was then subject to the jurisdiction of the German courts sitting therein.

IV.

Plaintiff admits the first 18 lines of Paragraph IV thereof except it is denied that since January 1, 1922, defendant has maintained or had or does not maintain or have an office or general representative or any agent whatever at Berlin, Germany, or elsewhere in Germany.

Plaintiff denies each and every allegation contained in the remainder of said Paragraph IV thereof.

And for reply to the third further and separate answer and defense to the third cause of action, being that matter contained on pages 49 and 50 of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I [153] and III thereof.

II.

Admits Paragraph II thereof.

And for reply to the fourth further and separate answer and defense to the third cause of action, being that matter set out on page 51 of said answer, plaintiff denies each and every allegation thereof or therein contained.

And for reply to the first further and separate answer and defense to the fourth cause of action, being that matter set out on pages 57 to —— of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and IV thereof.

II.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph II thereof, except that it is admitted that on December 7, 1903, defendant was authorized to transact the business of issuing the life insurance policies mentioned in the second amended complaint and in the answer.

III.

Plaintiff admits Paragraph III thereof, except that it is denied that the endowment provided for in the policy referred to in the second amended complaint and in the answer was payable in Germany; and denies that defendant since January 1, 1922, has been or is now authorized to do or transact business in Germany, or since said date has maintained or does now maintain an office or agent there, or since said time was or now is subject to the jurisdiction of the German courts or other German civil authorities. [154]

And for reply to the second further and separate answer and defense to the fourth cause of action, being that matter set out on pages 62 to 66 inclu-

sive of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in Paragraphs I and V thereof.

II.

Admits Paragraph II thereof except that it is denied that said policy was, in all or any respects, to be performed in Germany.

III.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph III thereof, except it is admitted said policy contains the provision quoted in said Paragraph III.

IV.

Plaintiff admits the first 21 lines of Paragraph IV thereof except it is denied that since January 1, 1922, defendant has maintained or had or does now maintain or have an office or general representative or any agent whatever at Karlsruhe, Germany, or elsewhere in Germany.

Plaintiff denies each and every allegation contained in the remainder of said Paragraph IV thereof.

And for reply to the first further and separate answer and defense to each and all of the causes of action, being that matter set out on pages 67 to 76 inclusive of said answer, plaintiff admits and denies as follows.

I.

Denies each and every allegation contained in Paragraphs I and VIII thereof.

II.

Admits Paragraph II thereof. [155]

III.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs III, V, and VII thereof.

IV.

Admits Paragraph IV thereof except it is denied that any of said policies, other than as to the payment of death benefits was performable in Germany; and it is denied that since January 1, 1922, *has* kept or maintained an office or agent or general representatiive or any other agent whatever in Germany, or that since said date defendant has been or now is subject to be summoned into or within the jurisdiction of the courts of Germany.

V.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraph VI thereof, except it is absolutely denied that the insured and beneficiaries of said policies or their assigns had or have no other right or claim save such as might be given as a matter of grace or public policy, or otherwise, by the German courts pursuant to section 242 of German Civil Code.

VI.

Denies each and every allegation contained in Paragraph IX thereof except it is admitted that section 242 of the German Civil Code provides substantially as quoted in said Paragraph IX.

And for reply to the second further and separate answer and defense to each and all of the causes of action, being that matter set out on pages 77 to 83 inclusive of said answer, plaintiff admits and denies as follows: [156]

I.

Denies each and every allegation contained in Paragraphs I and VI thereof.

II.

Plaintiff denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in Paragraphs II, III, IV and V thereof, except that it is absolutely denied that each or any of the policies of insurance in the second amended complaint or in the answer referred to is included within the alleged contracts or obligations alleged to be covered by said alleged valorization laws or said alleged decree of November 29, 1925.

And for reply to the third further and separate answer and defense to each and all of the causes of action, being that matter set out on pages 84 to 86, inclusive, of said answer, plaintiff admits and denies as follows:

I.

Denies each and every allegation contained in

Paragraphs I, II, III and IV thereof except that it is admitted that plaintiff was at all times and now is a citizen, subject and resident of Germany.

And for a further and separate reply to each of the first further and separate answers and defenses to the first, second, third and fourth causes of action, plaintiff alleges the following facts:

I.

During all the times mentioned in the second amended complaint and answer defendant was and is now a corporation organized and existing under the laws of the State of New York and by said laws it was and is now authorized to do a mutual life insurance business and during all of said times it was engaged in the mutual life insurance business. [157]

II.

Defendant's home and principal place of business is in the city of New York at which place it keeps its books, accounts, surpluses and profits as well as the major part of its assets. Its said surpluses and profits are kept in dollars and cents of the United States and not in the medium of payment of any other country.

The profits of defendant's entire business covering not only Germany, but every other country in which defendant does business, including England, Russia, France, Italy, the United States of America, Canada and elsewhere, are calculated and kept in dollars of the United States and have always been so; and are kept and figured in books and accounts located in the State of New York. And de-

fendant's said surpluses and profits are invested in values based on American dollars.

Defendant, at the time of the commencement of this action had, and ever since has continued to have and now has a large amount of assets and surpluses in American dollars in the State of Oregon.

III.

Prior to the year 1921 there was in full force and effect in the State of New York a statute known as Section 89 of Article 2 of Book 27 McKinney's Consolidated Laws of New York, a true and correct copy of which is attached hereto and marked Exhibit "X," which statute has ever since been in full force and effect and has never been amended or repealed.

IV.

During all the times mentioned in the second amended complaint and in the answer there was in full force and effect in the State of New York a law to the effect that all mutual companies were prohibited from any act or transaction which would create any discrimination between its policyholders of the same class and having the same expectancy of life whereby same would be given advantages not given to others or whereby disadvantages would be imposed on some and not upon others. [158]

V.

Defendant was admitted to transact business in Germany under and pursuant to the laws of Germany, except in Alsace-Lorraine, on August 6, 1904, to take effect on January 1, 1905, and not before.

VI.

On March 9, 1922, there was created and founded in Germany under the laws thereof, the said corporation referred to in the answer as "Kronos." In and by Article IV of the Articles of Incorporation of said Kronos it is provided as follows:

> "The company takes over the German business of the New York Life Insurance Company according to a transfer contract which is attached to and made a part of these articles."

VII.

On or about December 31, 1921, and prior to the creation of said Kronos a pretended contract was pretended to be entered into between said Kronos and defendant wherein defendant pretended to transfer to said Kronos its business in Germany and some of its policies issued to German residents and citizens, which said pretended contract was and is attached to the articles of incorporation of said Kronos. In and by Article I of said pretended contract it is provided as follows:

> "Art. I. The New York Life Insurance Company hereby transfers to the Kronos and the Kronos hereby accepts all the insurance contracts which the New York Life Insurance Company, under German laws and provisions issued upon the lives of citizens of Germany, of such persons who have their permanent domiciles there and which were still in effect of December 31, 1921, however excepting the following policies: (a) All policies which were not issued in German legal tender; (b) All poli-

cies of foreigners (including those who through territorial adjustments have become citizens of other states, for instance Poland, France, Denmark etc.) except where the owners have given their written consent to such transfer; (c) All policies of citizens of Germany who now reside outside of said country and have paid their premiums in foreign lands." [159]

VIII.

Defendant did not transfer to Kronos any part of its business done and transacted in countries other than Germany nor did it transfer to said Kronos all of its business transacted in Germany, but reserved from said pretended transfer some of its policies issued and payable in Germany to German citizens. Nor did defendant transfer or attempt to transfer to said Kronos all or any of its assets and surpluses which were then situated in countries other than Germany, and especially in the United States of America, which then amounted to and do now amount to upwards of $400,000,000.

IX.

Neither plaintiff nor the insured nor the beneficiaries named in either or any of the said policies referred to in the second amended complaint and in the answer, consented to said transfer, nor acquiesced therein nor in any way ratified or confirmed the same. Said pretended transfer is the same transfer referred to in the said first further and separate answers and defenses to the first, second, third and fourth causes of action. Neither defendant nor Kronos gave to either or any of said in-

sured or beneficiaries or plaintiff at any time any security for the payment of the demands to come due under either or any of said policies.

X.

It is the settled and established law of the Republic of Germany, announced, promulgated and declared by the courts of last resort thereof, having jurisdiction so to do, that said pretended transfer is illegal and void in that it fails to transfer all of the business of defendant in Germany, but reserves some thereof from said transfer. It is also the settled and established law of said Republic of Germany so announced, promulgated and declared that said transfer does not bind plaintiff nor discharge defendant from any of its obligations under its policy in the absence of the consent of [160] plaintiff to such transfer. It is also the settled and established law of said Republic, so announced, promulgated and declared that a transfer of policies of insurance from one company to another cannot legally be accomplished without giving to the insured security that his demand will be paid by the transferee company.

It is also the settled and established law of said Republic, so announced, promulgated, and declared that a mutual insurance company cannot legally discriminate between its members of the same class and therefore cannot transfer some of its business whereby some of its members will have less security for their demands than other members of the same class.

Said laws have never been repealed, overruled,

modified or changed in any way and are now in full force and effect.

XI.

By virtue of said laws the alleged and pretended novation and transfer of business from defendant to Kronos is illegal and void in that all of defendant's business was not transferred to Kronos nor was all of its German business so transferred, and because neither the said insureds nor beneficiaries nor plaintiff ever consented to said transfer nor was any security given them, and because its manifest purpose was and its effect, if valid, would be to create an unlawful discrimination in favor of policy-holders residing outside Germany and against policy-holders residing in Germany, contrary to the public policy of the German Republic and of the State of New York and of the United States.

And for a further and separate reply to each of the second further and separate answers and defenses to the first, second, third and fourth causes of action, plaintiff alleges the following facts: [161]

I.

The provisions quoted in Paragraphs numbered III in each of the second further and separate answers and defenses to the first, second, third and fourth causes of action, as being contained in the policies, refer to suits and actions to enforce the terms of said policies, and it was so decided in the case of Wilhelm Rinck against the defendant, which was an action to enforce the terms of the policy, and was not an action at all similar to this

one, which is an action to recover damages in American dollars for the breach of said policies, of which action the courts of Germany have no jurisdiction at all.

II.

The causes of action sued on in this action did not arise in Germany but arose in the State of Oregon, at the time of the filing of the complaint herein.

III.

The policies of insurance mentioned in the second amended complaint and in the answer contain the provisions alleged in Paragraph III of the first cause of action, and in Paragraph III of the second cause of action, and in Paragraphs III and V and VI of the third cause of action, set out in the second amended complaint and the policy mentioned in the fourth cause of action set out in the complaint contains substantially the same provisions as those alleged in said Paragraph III of the second cause of action set out in said second amended complaint. And the said policies mentioned in said second and fourth causes of action also contain the following provision:

> "The security fund of the company as well as all surplus of it are the exclusive right of the insured."

IV.

During all the time since the issuance of said policies of insurance defendant has been engaged in the business of issuing similar policies of insurance on similar terms and conditions not only in Germany but also in England, France, Italy, Sweden, Denmark, Canada, Australia and the

United States of America, [162] as well as elsewhere, and the profits to which plaintiff is entitled under his said policies are those which have accumulated from all the business done by defendant everywhere during the 20 years next succeeding the issuance of said policies.

The said profits have been kept and ascertained and calculated during all of said twenty years in books of account of all the business done by defendant, which books of account and the supporting documents, papers and data have always been kept by defendant in its home office at New York City, in the State of New York, in the United States of America.

And said profits during all of said times have been kept, ascertained, calculated, invested and reinvested in values based on the American dollar and in terms of the American dollar. And the larger part of said profits have been, during said 20 years, earned by defendant in American dollars and in values based on said American dollars.

V.

A large part of defendant's surpluses and assets at the time of the commencement of this action were, and now are, located and kept in the States of New York and of Oregon in the United States of America in American dollars.

VI.

By reason of the said provisions of said policies of insurance the intention was that defendant at the option and for the convenience of plaintiff was to submit to the jurisdiction of the particular Ger-

man courts mentioned in actions to enforce said policies, but it was not intended to compel the insured or beneficiaries or their assigns to resort only to these courts in actions wherein it is sought to proceed against the surplus and assets of defendant located in Oregon or in the United States, nor was it intended thereby to limit or restrict the insured and beneficiaries to recover only out of the defendant's [163] assets located in Germany.

VII.

Defendant is a mutual life insurance corporation organized and existing under and pursuant to the laws of the State of New York and is doing business in the State of Oregon under and pursuant to the laws thereof.

Heretofore defendant complied with the laws of the State of Oregon concerning the doing of business in Oregon by foreign corporations and it filed on the —— day of ———— with the Corporation Commissioner of said state a power of attorney, as required by said laws, which power of attorney ever since has been and now is on file in said office, a copy of which power of attorney is hereto attached and marked Exhibit "Z," and is hereby referred to for its terms and provisions.

Said power of attorney was duly executed by defendant pursuant to a resolution of its Board of Directors and was regularly acknowledged by the designated and authorized officers of defendant.

And for a further and separate reply to the third further and separate answer and defense to the

second cause of action, plaintiff alleges the following facts:

I.

The cause of action sued on in the second cause of action set out in the second amended complaint did not arise until the date of the commencement of this action.

And for a further and separate reply to the third further and separate answer and defense to the third cause of action, plaintiff alleges the following facts:

I.

The cause of action sued on in the third cause of action set out in the second amended complaint did not arise until the date of the commencement of this action.

And for a further and separate reply to the first further and separate answer and defense to each and all of the causes of action, plaintiff alleges the following facts: [164]

I.

At the times of the issuance of the four policies of insurance mentioned in the second amended complaint and in the answer the German Empire monetory system consisted of various issues of currency such as paper marks, gold marks, and metal coins, and the payments due under said policies, other than profits, were payable in legal tender of Germany, which legal tender included gold marks as well as paper marks.

On June 1, 1909, the Deutsche Reischswahrung mark was created and made legal tender, the same being an issue of paper currency, but the gold mark theretofore existing was not changed but has remained legal tender of Germany ever since the time of the issuance of said policy to the present time. [165]

In August, 1924, said Deutsche Reischswahrung mark was by legislative act of Germany discontinued as legal tender and put out of circulation and was no longer money of Germany.

II.

This action is not to recover either Deutsche Reischswahrung marks or gold marks, or any marks whatever, but is an action to recover damages in dollars for the failure of defendant to pay the cash value of said policy when due, and this cause of action did not arise in Germany, but arose in Oregon when the demand was made by the filing of the complaint.

III.

During all the times since the issuance of said policies of insurance defendant has been engaged in the business of issuing similar policies of insurance on similar terms and conditions not only in Germany, but also in England, France, Italy, Sweden, Denmark, Canada, Australia, and the United States of America, as well as elsewhere, and the profits to which plaintiff is entitled under his said policies are those which have accumulated from all the business done by defendant every-

where during the 20 years next succeeding the issuance of said policies.

IV.

The profits earned by defendant in which plaintiff is entitled to participate by virtue of said policies of insurance were earned and kept in American dollars and plaintiff is entitled to his proportionate share of said profits in American dollars.

V.

It is the settled and established law of Germany, announced and declared by its courts of the last resort, having jurisdiction so to do, which has never been repealed, overruled, modified or altered but is still in full force and effect that whether or not defendant has suffered losses by reason of the depreciation in value of the Deutsche Reischwahrung mark is immaterial because such losses are figured in [166] and accounted for in ascertaining the net profits earned by defendant; and that such losses are also immaterial and will not be considered except upon a showing of a balance sheet of all the defendant's entire business done everywhere, because such losses in Germany by reason of the depreciation in value of said mark may be compensated and equalized or even exceeded by gains and profits from its business elsewhere.

And for a further and separate reply to the second further and separate answer and defense to each and all of the causes of action, plaintiff alleges the following facts:

I.

During all the times mentioned in the amended complaint and answer defendant was and is now a corporation organized and existing under laws of the State of New York and by said laws it was and is now authorized to do a mutual life insurance business and during all of said times it was engaged in the mutual life insurance business.

II.

Defendant's home and principal place of business is in the City of New York in the State of New York at which place it keeps its books, accounts, surpluses and profits as well as the major part of its assets. Its said surpluses and profits are kept in dollars and cents of the United States and not in the medium of payment of any other country.

III.

The dividends and profits of defendant's entire business covering not only Germany, but every other country in which defendant does business, including England, Russia, France, Italy, the United States of America, Canada and elsewhere, are calculated and kept in dollars of the United States and have always been so; and are kept and figured in books and accounts located in the State of New York. And defendant's profits and surpluses are invested in values based on the American dollar. [167]

Said defendant, at the time of the commencement of this action had, and ever since has continued to have and now has a large amount of assets and

surpluses in American dollars situated in the State of Oregon.

IV.

Defendant has not surrendered or delivered to any trustee or commissioner appointed in Germany under said alleged revalorization law all of its assets and surpluses but has reserved and retained a large part thereof outside of the jurisdiction of Germany and in countries other than Germany and especially in the United States of America, in which latter country defendant has surpluses aggregating over $400,000,000, much of which was earned as profits during the 20 years immediately following the 26th day of September, 1903.

V.

Defendant has not and does not admit its liability on any of the policies referred to in the second amended complaint and answer, nor does it admit liability for a breach of the covenants and provisions thereof and by its said answer has denied all and any liability thereunder or therefor.

VI.

The cause of action sued on in this action did not arise in Germany but arose in the State of Oregon, at the time of the filing of the complaint herein.

VII.

The large part of defendant's surpluses and assets at the time of the commencement of this action were, and now are, located and kept in the States of New York and of Oregon in the United States of America in American dollars.

VIII.

For the purpose of brevity plaintiff by reference thereto incorporates herein all the allegations contained in the preceding further and separate replies. [168]

IX.

It is the settled and established law of the German Republic as announced, interpreted and declared by its courts of record and of general jurisdiction, and its courts of last resort, in decisions which have never been repealed, overruled, reversed, modified or altered in any way, but which still are in full force and effect, as follows:

(a) Said Revalorization Law has no application in a case or action brought to enforce an insurance contract, but only applies where application is made under said law for revalorization.

(b) Said Revalorization Law has no application in any case where defendant does not admit liability. Where defendant files an answer denying liability said revalorization law is not applicable.

(c) Said Revalorization Law has no application to a contract to pay accumulated profits or dividends as set forth and contained in plaintiff's said policy of insurance.

(d) Said Revalorization Law has no application to a contract which gives to the payee thereof an election as to whether he will require performance in money or in the issuance of extended insurance or in an annuity, or in any performance other than the payment of money, but applies only to contracts for the payment of a definite sum of money in German marks.

(e) Said Revalorization Law has no application except in cases where the debtor has surrendered and delivered to the commissioner or trustee, appointed under said law, and whose position and duties are similar to a trustee in bankruptcy, all of his assets, property and surpluses.

(f) Said Revalorization Law does not concern itself with the question of liability, but only with the amount admitted to be due.

(g) Whether or not the debtor has suffered losses by [169] reason of the depreciation in value of the German mark is immaterial in cases on contracts to pay accumulated profits, because such losses must necessarily be figured in and accounted for in ascertaining the profits.

(h) Whether or not the debtor has suffered losses by reason of the depreciation in value of the German mark is immaterial and will not be considered in insurance cases based on mutual policies, in the absence of a showing by the company of a balance sheet containing all of its business transactions everywhere, because its losses by depreciation of the German mark in Germany may be compensated and equalized or even exceeded by gains and profits from its business elsewhere.

And for a further and separate reply to the third further and separate answer and defense to each and all of the causes of action, plaintiff alleges the following facts:

I.

For the sake of brevity plaintiff reaffirms and realleges each and all of the facts alleged in the fore-

going further and separate replies, which are hereby referred to and made a part thereof.

II.

This court has no discretion to refuse to take jurisdiction of this cause of action, which cause of action arose in Oregon upon the filing of the complaint.

III.

One of the issues of fact is as to the existence and amount of profits and whether or not the surpluses and assets of defendant are and have been kept in American dollars, which issues can only be proved by the books and accounts of defendant which are kept in the English language and in the United States.

IV.

The said profits are payable out of the earnings and [170] assets of defendant which were earned and accumulated in American dollars and kept as such by defendant, and said profits became due in American dollars.

WHEREFORE plaintiff prays for judgment as in his second amended complaint prayed for.

(Signed) C. T. HAAS,
Attorney for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

I, C. T. Haas, being first duly sworn, depose and say that I am the attorney for the plaintiff in the above-named action and that the foregoing reply is true as I verily believe. I make this verification by reason of the fact that the plaintiff is not a resi-

dent of Multnomah County, or the State of Oregon, and that the within action is based upon documents in my possession.

C. T. HAAS.

Subscribed and sworn to before me this 2d day of June, 1930.

IDA BELLE TREMAYNE,
Notary Public for Oregon.

My commission expires 7/10/32.

State of Oregon,
County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this —— day of May, 1930, by receiving a copy thereof, duly certified to as such by C. T. Haas, of attorneys for plaintiff.

A. E. CLARK,
Of Attorneys for Defendants.

Filed June 3, 1930. [171]

AND AFTERWARDS, to wit, on the 7th day of June, 1930, there was duly filed in said court, a motion to dismiss cause, in words and figures as follows, to wit: [172]

[Title of Court and Cause—Cause No. L.–10,535.]

MOTION TO DISMISS.

Comes now the defendant and upon the pleadings, files and records of this case and the affidavits of Walker Buckner and Richard Kruse filed and sub-

mitted in this action in connection with this motion and the affidavits of Walker Buckner, Dr. Arthur Buchard and A. E. Clark filed with the Clerk of this court and served upon the attorney for plaintiff in support of a motion to dismiss the action wherein Henry Heine is plaintiff and the above-named defendant is defendant, pending in this court, being L.–10,465;

Moves the court for an order dismissing this action and each cause of action stated in the second amended complaint for lack of jurisdiction of the subject matter thereof, or, in the alternative, that the court in the exercise of its discretion decline to accept and retain jurisdiction of this action and dismiss the same.

HUNTINGTON, WILSON & HUNTINGTON, and

CLARK & CLARK,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, this 7th June, 1930.

C. T. HAAS,
Of Attorneys for Plaintiff.

Filed June 7, 1930. [173]

AND AFTERWARDS, to wit, on the 7th day of June, 1930, there was duly filed in said court, an affidavit of Walker Buckner, in words and figures as follows, to wit: [174]

[Title of Court and Cause—Cause No. L.–10,535.]

AFFIDAVIT OF WALKER BUCKNER.

State of New York,
County of New York,—ss.

I, Walker Buckner, being first duly sworn, upon oath depose and say:

I am the same person, who, as Walker Buckner, filed and verified on May 13, 1930, an affidavit in the cause now pending in the above-entitled court wherein Henry Heine is plaintiff and the said New York Life Insurance Company is defendant, being case number L.–10,465, and to said affidavit I now refer and reaffirm all that is therein said, and in order to avoid unnecessary repetition, by reference make the same a part of this affidavit.

What is further said in this affidavit relates more particularly to the four (4) policies involved in the above-entitled action issued by the defendant, to wit: number 1554478 to Ludwig Schnell, number 1501882 to Martin Loeb, number 1505347 to Herman-Kaiser-Bluth, and number 2508291 to Wilhelm Eduard Stadelmeyer.

I have read the answer of the defendant to the amended complaint in the above-entitled action, including [175] the exhibits thereto attached.

I have examined policy No. 1554478 issued by defendant about December 31, 1904, to Ludwig Schnell and upon which is based the first cause of action in the complaint of the plaintiff. An English translation of said policy is attached to the answer of the defendant herein as Exhibit "A." Said

policy was issued pursuant to an application in writing to defendant in Germany made by said Schnell signed by said Schnell at Breslau, Germany, and in which said applicant gave his birthplace as Strehlen, Silesia, Germany, and his place of residence at Breslau, which is also his last known place of address. The signature of G. Nimptsch, the principal attorney-in-fact and Chief Representative of defendant in Germany and the signature of defendant's secretary for Germany were the last signatures affixed to the policy and were actual signatures written upon the policy in Germany by said persons, respectively. At the time the policy was issued, W. E. Ingersoll, whose signature appears thereon, was a resident of Europe and director-general of the defendant for Europe. At that time and for many years thereafter, G. Nimptsch was the principal attorney-in-fact and Chief Representative for the defendant in Germany, and during all the time that he was such Chief Representative, he was a resident in and subject of the German Empire until it was succeeded by the Republic of Germany and thereupon continued to be a citizen and resident of said Republic. His signature was placed upon said Schnell policy at Berlin, Germany, prior to the delivery thereof to said Schnell, as was also the signature of defendant's secretary for Germany. The policy was written entirely in [176] the German language and was delivered to the insured in Germany. At the time the insured made application to the defendant for said policy and at the time said policy was issued, the insured was a resident in and subject of Germany and has

continued to the present time a citizen and resident of Germany as affiant is informed and avers and believes the fact to be.

All payments called for by the policy whether of premiums to be paid by the insured or sums to be paid to the insured or other beneficiary were payable in "Mark D. Rwg." This expression is an abbreviation for "Mark Deutscher Reichswaehrung" and translated into English reads "Mark in the currency of the German Reich." All premiums were payable at the head office of the defendant in Berlin, and all payments payable to the insured or other beneficiary under the said policy were by its terms payable at the office of the defendant in Berlin, Germany.

The policy contains a clause reading as follows:

> "For the execution of the present contract the Company designates as legal domicile the office of its General Representative for the State in which the insurance contract was made.
>
> "For all lawsuits that may arise under this contract the Company, as defendant, submits, at the option of the insured, either to the jurisdiction of the courts to which its General Representative for the State in which the insurance contract was made is subject, or to the jurisdiction of the courts to which the agent, through whom the insurance was made, is subject."

I refer to Exhibit "A" attached to the answer herein for a more particular statement of the terms and conditions of said policy.

I have examined defendant's dossier and records and data relating to the above policy. These records disclose as follows: [177]

The premiums thereupon were paid up to and including December 31, 1923, and all of said premiums were paid at defendant's offices in Germany and were paid in the currency mentioned in the policy, to wit, marks, for the nominal amount of marks therein mentioned and for that amount only. Any premiums paid thereafter by the insured were paid to or payment thereof waived by the German Insurance Company called Kronos, mentioned in the affidavit filed by me in the Heine action.

I also note from the defendant's records relating to said policy, that the insured obtained on May 10, 1918, a loan upon the policy amounting to marks 4878 and repaid this loan to the Kronos on September 6, 1922. Receipt therefor was made by the Kronos to the insured and the original policy returned by the Kronos to the insured. I also find from defendant's records and from the regular published financial and exchange quotations that an American dollar on May 10, 1918, was worth in Berlin 5.13 marks and on September 8, 1922, was worth in Berlin 1250 marks.

I also find that on November 7, 1924, the insured wrote the Kronos asking for "most favorable conditions under which you would settle my policy, and also whether a conversion into gold marks is possible, with the formalities which are to be fulfilled for this purpose." Kronos replied to the effect that no conversion into gold marks was possible and quoted terms for new insurance.

I have examined policy No. 1501862 issued by defendant about July 12, 1902, to Martin Loeb and upon which is based the second cause of action in the complaint of the plaintiff. An English translation of said policy is attached [178] to the answer of the defendant herein as Exhibit "C." Said policy was issued pursuant to an application in writing to defendant in Germany made by said Loeb signed by said Loeb at Stuttgart, Germany, and in which said applicant gave his birthplace as Stuttgart and place of residence as Stuttgart, which is also his last known place of address. The policy was issued by the defendant at Stuttgart, Germany, through the office of its General Agent for the Kingdom of Württemberg. The signature of defendant's General Agent for the Kingdom of Württemberg was the last signature affixed to the policy and was an actual signature written upon the policy in Germany. At the time the policy was issued A. Fausche, whose signature appears thereon, was a resident of Europe and secretary for Europe of defendant. At that time and for many years thereafter, defendant's aforementioned General Agent for the Kingdom of Württemberg held that position for defendant in Germany and during all the time that he held such position, he was a resident in and subject of the German Reich. His signature was placed on said Loeb policy in Germany, prior to the delivery of said policy to said Loeb. The policy was written entirely in the German language and was delivered to the insured in Germany. At the time the insured made application to the defendant for said policy and at the time said policy

was issued, the insured was a resident in and subject of Germany and has continued to the present time a citizen and resident of Germany as affiant is informed and avers and believes the fact to be.

All payments called for by the policy whether of premiums to be paid by the insured or sums to be paid to [179] the insured or other beneficiary were payable in "Mark D. Rwg." This expression is an abbreviation for "Mark Deutscher Reichswaehrung" and translated into English reads "Mark in the currency of the German Reich." All premiums were payable at the office of the defendant at Stuttgart, Germany, and all payments payable to the insured or other beneficiary under said policy were by its terms payable at the office of the defendant in Stuttgart, Germany.

The policy contains a clause headed "Legal Domicile" which reads as follows:

> "LEGAL DOMICILE: For the performance of the present contract, the courts in Stuttgart alone are competent; as legal domicile for the Company there is stipulated its office at Stuttgart and for the insured and the beneficiary the place stipulated in the application for the insurance."

I have also examined defendant's dossier, data and records relating to said Loeb policy. I find that all premiums upon said policy were paid to the maturity thereof, to wit, July 12, 1922. Defendant's records show that all of said premiums were paid at defendant's offices in Germany and were paid in the currency mentioned in the policy, to wit, marks, for the nominal amount therein men-

tioned and for that amount only. I also find from said records that prior to the maturity of the policy, to wit, July 12, 1922, the insured was notified of the different modes of settlement permitted under the policy, and that the insured chose option N providing for the conversion of the policy to a paid up policy payable only upon death and nonparticipating in the profits of the company, obligating the insured, however, to submit to a medical examination.

The insured submitted to such medical examination and was informed by the Kronos that the report thereof was [180] satisfactory. Upon the request of the Kronos, the insured on August 21, 1922, returned to the Kronos his policy with the request that the same be endorsed as a paid up policy for 53,020 marks under option N. Such endorsement was made and signed by the Kronos as of August 25, 1922, and the policy returned to the insured.

I have examined policy No. 1505347 issued by defendant about September 24, 1902, to Hermann Kaiser-Bluth, and upon which is based the third cause of action in the complaint of the plaintiff. An English translation is attached as Exhibit "D." Said policy was issued pursuant to an application in writing to defendant in Germany made by said Kaiser-Bluth at Coln (Cologne), Germany, in which said applicant gave his birthplace as Naumburg, Germany, and his place of residence at the time of said application as Coln (Cologne), Germany, which is also his last known place of address. The signature of G. Nimp-

tsch, the principal attorney-in-fact and Chief Representative of defendant in Germany was the last signature affixed to the policy and was an actual signature written upon the policy in Germany by said Nimptsch. At that time Nimptsch, whom I have previously mentioned in this affidavit, was defendant's attorney-in-fact and Chief Representative for Germany. His signature was placed upon said Kaiser-Bluth policy at Berlin, Germany, prior to the delivery thereof to said Kaiser-Bluth. The policy was written entirely in the German language and was delivered to the insured in Germany. At the time the insured made application to the defendant for said policy and at the time said policy was issued, the insured was a resident and citizen of Germany and has continued [181] to the present time a citizen and resident of Germany as affiant is informed and avers and believes the fact to be.

All payments called for by the policy, whether of premiums to be paid by the insured or sums to be paid to the insured or other beneficiary were payable in "Mark D. Rwg." This expression is an abbreviation for "Mark Deutscher Reichswaehrung" and translated into English reads "Mark in the currency of the German Reich." All premiums were payable at the head office of defendant in Berlin, Germany, and all payments payable to the insured or other beneficiary under the said policy were by its terms payable at the office of the defendant in Berlin, Germany.

The policy contains a clause reading as follows:

"For the execution of the present contract the Company designates as legal domicile the office of its General Representative for the State in which the insurance contract was made.

"For all lawsuits that may arise under this contract the Company, as defendant, submits, at the option of the insured, either to the jurisdiction of the courts to which its General Representative for the State in which the insurance contract was made is subject, or to the jurisdiction of the courts to which the agent, through whom the insurance was made, is subject."

I have also examined defendant's dossier, records and data relating to this policy. Said records disclose as follows:

All premiums upon said policy were paid up to and including the maturity thereof, to wit, September 24, 1902. All of said premiums were paid at defendant's offices in Germany and were paid in the currency mentioned in the [182] policy, to wit, marks, for the nominal amount of marks therein mentioned and for that amount only. The policy was paid in full by the Kronos on September 28, 1922, the amount of a loan (to wit, 14,000 marks) obtained on September 28, 1915, being deducted from the amount otherwise payable to the insured. The file contains a receipt given to the Kronos by the insured acknowledging receipt of the payment "in settlement of all rights and claims under the insurance contract." I find from defendant's records and the regular published financial and exchange quotations that on September 28, 1915, an American dollar was worth in Berlin 4.86 German

marks, and that on September 29, 1922, an American dollar was worth in Berlin 1630 German marks.

I have examined policy No. 2508291 issued by defendant about December 7, 1903, to Wilhelm Eduard Stadelmeyer, and upon which is based the fourth cause of action in the complaint of the plaintiff. An English translation of said policy is attached to the answer of the defendant herein as Exhibit "E." Said policy was issued pursuant to an application in writing to defendant in Germany made by said Stadelmeyer signed by said Stadelmeyer at Pforzheim, Baden, Germany, which was his place of residence at the time and is also his last known place of residence. In the application he gave his place of birth as Schwaeb Omsund, Germany. The signature of G. Nimptsch, defendant's attorney-in-fact and Chief Representative for Germany and the signature of G. Bohlmann, defendant's actuary for Germany, were the last signatures affixed to the policy and were actual signatures written on the policy in Germany by said persons repectively. At that time and for many years thereafter said G. Bohlmann was defendant's actuary for Germany and during all [183] the time that he was such actuary he was a resident in and subject of the German Reich. The signatures of said N. Nimptsch and G. Bohlmann were placed upon said policy in Berlin, Germany, prior to the delivery thereof to said Stadelmeyer. The policy was written entirely in the German language and was delivered to the insured in Germany. At the time the insured made application to the defendant for said policy and at the time said policy was issued,

the insured was a resident in and subject of Germany and has continued to the present time a citizen and resident of Germany, as affiant is informed and avers and believes the fact to be.

All payments called for by the policy whether of premiums to be paid by the insured or sums to be paid to the insured or other beneficiary were payable in "Mark D. Rwg." This expression is an abbreviation for "Mark Deutscher Reichswaerung" and translated into English reads "Mark in the currency of the German Reich." All premiums were payable at the office of the defendant at Mannheim, Germany, and all payments payable to the insured or other beneficiary of said policy were by its terms payable at the office of the defendant in Mannheim, Germany.

The policy contains a clause headed "Legal Domicile" reading as follows:

> "LEGAL DOMICILE: For the performance of the present contract, the courts in Karlsruhe alone are competent; as legal domicile for the Company there is stipulated its office at Mannheim, and for the insured and the beneficiary the place stipulated in the application for the insured."

I have examined defendant's dossier, records and data relating to said Stadelmeyer policy. Said records disclose as follows: [184]

The premiums upon said policy were paid only to December 7, 1905, upon which date default was made in the payment of premiums upon said policy. All of the premiums paid upon said policy were paid at defendant's offices in Germany and were

paid in the currency mentioned in the policy, to wit, marks, for the nominal amount of marks therein mentioned.

On February 15, 1906, upon the request of the insured, the policy was converted into a paid up policy for 600 marks without participation in profits or the right to receive loans, said sums to be payable on December 7, 1928, or upon the prior death of the insured, and an endorsement to that effect was made upon the policy. The policy with such endorsement was returned to the insured.

The four (4) policies involved in this action were included in the transfer by the defendant to "Kronos," which is referred to in my affidavit in the Heine case, and is also referred to at length in the answer of the defendant in the above-entitled action. After such transfer was made each of the insured in the said four policies dealt wholly with "Kronos."

I do not in this affidavit do more than mention the German Insurance Law of May 12, 1901, the monetary legislation of Germany prior to the outbreak of the World War, the monetary legislations of Germany following the World War of August and September, 1914, the monetary and banking Acts of August 30, 1924, the Revaluation Act of July 16, 1925, and the enforcement Decree issued thereunder on November 29, 1925, the decision of the German Insurance Board of October 25, 1928, holding that the New York Life [185] Insurance Company was a supervised company within the meaning of the Revaluation Act and the enforcement decree referred to, the decision

of the Appellate Division of February 13, 1929, affirming the decision of the German Insurance Board, and the decision of the Federal Insurance Department for Private Insurance of February 12, 1930, and the decisions of the German courts construing and applying said laws,—because they have been fully dealt with by my affidavit in the Heine case, the affidavit of Dr. Arthur Burchard made and filed in the Heine case and in the answer of the defendant in this case, to which I make reference, and it would be unnecessary repetition for me to repeat what is there said and available for the court in this case.

I am informed, believe and aver the fact to be that Paul Hermann, plaintiff in the above-entitled action, and who brings the action as alleged assignee of Schnell, Loeb, Kaiser-Bluth and Stadelmeyer is now and at all times was a citizen and resident of Germany, residing at Heidelburg.

All of the transactions relating to the policies of insurance involved in this action occurred in Germany and in the German language. There are no witnesses to any of said transactions or to any of the issues in this case, residing in Oregon. All of defendant's original data, correspondence and documents relating to defendant's business in Germany and policies issued there were kept in Germany and are still in Germany, except as request for same is made for use in connection with litigation in America upon [186] said German policies. It would impose upon the defendant great difficulty, inconvenience and unnecessary and avoidable expense if

compelled to try this case and other similar cases in the courts of Oregon.

I have read the answer to the amended complaint herein and know the contents thereof. I verily believe the allegations therein made to be true.

WALKER BUCKNER.

(Signed) WALKER BUCKNER.

Subscribed and sworn to before me this 31st day of May, 1930.

[Seal] CLARA M. SWANSON.

(Signed) CLARA M. SWANSON,
Notary Public,
Cook County, Michigan.

District of Oregon,
County of Multnomah,—ss.

Due service of the within affidavit is hereby accepted in Multnomah County, Oregon, this 7th day of June, 1930, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendant.

C. T. HAAS,
Attorney for Plaintiff.

Filed June 7, 1930. [187]

AND AFTERWARDS, to wit, on the 9th day of June, 1930, there was duly filed in said court, a stipulation that answer to amended complaint shall stand as the answer to second amended complaint, in words and figures as follows, to wit: [188]

[Title of Court and Cause—Cause No. L.–10,535.]

STIPULATION THAT ANSWER TO AMENDED COMPLAINT SHALL STAND AS ANSWER TO SECOND AMENDED COMPLAINT.

WHEREAS, plaintiff heretofore served and filed a complaint containing four causes of action and later filed an amended complaint containing a similar number, to which amended complaint an answer was by defendant served and filed, and now plaintiff has served and filed a second amended complaint containing a like number of causes of action, it is therefore stipulated:

1. As to the first cause of action, the answer and the several separate answers and defenses (including those which refer to a single cause of action, as well as those which refer and are applicable to several causes of action) heretofore interposed to the said first cause of action contained in the amended complaint, shall stand as the answer to the first cause of action contained in the second amended complaint; that all allegations contained in the said first cause of action shall be deemed to be and shall stand as wholly denied, except as to those allegations which are identical in every respect with allegations contained in the amended complaint relating to the same subject matter and which are expressly admitted in the answer.

2. As to the second cause of action, the answer and [189] the several separate answers and de-

fenses (including those which refer to a single cause of action, as well as those which refer and are applicable to several causes of action) heretofore interposed to the second cause of action contained in the amended complaint, shall stand as the answer to the second cause of action contained in the second amended complaint; that all allegations contained in the said second cause of action shall be deemed to be and shall stand as wholly denied, except as to those allegations which are identical in every respect with allegations contained in the amended complaint relating to the same subject matter and which are expressly admitted in the answer.

3. As to the third cause of action, the answer and the several separate answers and defenses (including those which refer to a single cause of action, as well as those which refer and are applicable to several causes of action) heretofore interposed to the said third cause of action contained in the amended complaint, shall stand as the answer to the third cause of action contained in the second amended complaint; that all allegations contained in the said third cause of action shall be deemed to be and shall stand as wholly denied, except as to those allegations contained in the amended complaint relating to the same subject matter and which are expressly admitted in the answer.

4. As to the fourth cause of action, the answer and the several separate answers and defenses (including those which refer to a single cause of action, as well as those which refer and are applicable to several causes of action) heretofore interposed

to the said fourth cause of action contained in the amended complaint, shall stand as the answer to the fourth cause of action contained in the second amended complaint; that all allegations contained in the said fourth cause of action shall be deemed to be and shall stand as wholly denied, except as to those allegations which are identical in every respect [190] with allegations contained in the amended complaint relating to the same subject matter and which are expressly admitted in the answer.

IT IS FURTHER STIPULATED that the defendant may at any time hereafter, at its option, file an amended answer to said second amended complaint and each of the causes of action therein contained, the answer above referred to supplemented by this stipulation being regarded as the original answer to said second amended complaint.

Dated at Portland, Oregon, this 22d day of May, 1930.

C. T. HAAS,
Attorney for Plaintiff.
CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Defendant.

Filed June 9, 1930. [191]

AND AFTERWARDS, to wit, on the 29th day of September, 1930, there was duly filed in said court, a notice by defendant that it will rely upon the record in the case of Henry Heine vs. New York Life Insurance Company on the hearing of the motion to dismiss, in words and figures as follows, to wit: [192]

[Title of Court and Cause—Cause No. L.–10,535.]

NOTICE BY DEFENDANT THAT IT WILL RELY ON RECORD IN CASE OF HENRY HEINE vs. NEW YORK LIFE INSURANCE COMPANY ON HEARING OF MOTION TO DISMISS.

Please take notice that upon a hearing of the motion to dismiss in this case the defendant will rely upon and urge in support of said motion and in addition to the pleadings, files, affidavits and records referred to in said motion, the supplemental affidavit of Dr. Arthur Burchard and the supplemental affidavit of A. E. Clark, one of the attorneys for the defendant, made and filed in the case of Henry Heine, plaintiff, against the New York Life Insurance Company, defendant, pending in this court, and being number L.–10,465.

Dated: September 25, 1930.

HUNTINGTON, WILSON & HUNTINGTON, and

CLARK & CLARK,

Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 25th day of September, 1930, by receiving a copy thereof, duly certified to as such by A. E. Clark, of attorneys for defendant.

C. T. HAAS,
Attorney for Plaintiff.

Filed September 29, 1930. [193]

AND AFTERWARDS, to wit, on Monday, the 1st day of December, 1930, the same being the 19th judicial day of the regular November term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [194]

[Title of Court and Cause—Cause No. L.–10,535.]

ORDER SUSTAINING MOTION TO DISMISS CAUSE AND JUDGMENT.

This cause is now before the Court on motion of the defendant for an order dismissing the same and each cause of action set forth in the amended complaint for lack of jurisdiction of the subject matter thereof, or in the alternative, that the Court in the exercise of its discretion decline to retain and accept jurisdiction of the cause and dismiss the same.

Charles T. Haas and E. B. Seabrook appeared

in behalf of the plaintiff and Clark & Clark and Huntington, Wilson & Huntington appeared in behalf of the defendant.

The motion was heard on the files and records in the cause and on the affidavits of Walker Buckner and Richard Kruse filed in this cause and the affidavit and supplemental affidavit of Dr. Arthur Buchard and the affidavit and supplemental affidavit of A. E. Clark filed with the Clerk of this court in the action wherein Henry Heine is plaintiff and the above-named defendant is defendant, being cause Number L.–10,465, in support of said motion, and the affidavits of Charles T. Haas and Peter A. Schwabe filed in the said cause of Henry Heine *versus* the above-named defendant in opposition to said motion.

The Court having heard the arguments of counsel and examined the briefs submitted thereby and being advised in the premises,

IT IS ORDERED that said motion be and the same hereby allowed;

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED that this cause be and the same is hereby dismissed.

Dated at Portland, Oregon, December 1, 1930.

R. S. BEAN,
Judge.

Filed December 1, 1930. [195]

AND AFTERWARDS, to wit, on the 4th day of February, 1931, there was duly filed in said court, a notice of appeal, in words and figures as follows, to wit: [196]

[Title of Court and Cause—Cause No. L.–10,535.]

NOTICE OF APPEAL.

To the Above-named Defendant and to Its Attorneys of Record:

You will please take notice and you are hereby notified that plaintiff above named appeals to the Circuit Court of Appeals of the United States for the Ninth Circuit from that certain judgment made and entered in and by the District Court of the United States for the District of Oregon in the above-entitled cause on December 1, 1930, dismissing the plaintiff's complaint and for costs and disbursement, which judgment is in favor of the above-named defendant and against the above-named plaintiff, and plaintiff so appeals from the whole and every part of said judgment.

Dated this 3d day of February, 1931.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Plaintiff.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely and legal service by copy of the within and foregoing notice of appeal is hereby ad-

mitted at Portland, Oregon, this 3d day of February, 1931.

CLARK & CLARK,
Attorneys for Defendant.

Filed February 4, 1931. [197]

AND AFTERWARDS, to wit, on the 4th day of February, 1931, there was duly filed in said court, a petition for appeal, in words and figures as follows, to wit: [198]

[Title of Court and Cause—Cause No. L.–10,535.]

PETITION FOR APPEAL.

To the Honorable Judge of the Above-entitled Court:

The above-named plaintiff, Paul Herrmann, feeling aggrieved by the judgment rendered and entered by the above-entitled court in the above-entitled cause on the first day of December, 1930, wherein and whereby it was ordered and adjudged that the complaint of the said plaintiff be dismissed and that defendant, above named recover of and from plaintiff its costs and disbursements incurred herein, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and said plaintiff prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenti-

cated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco, in the State of California, under the rules of such court in such cases made and provided.

And your petitioner, said plaintiff, further prays that a proper order relating to the required security to be required of him be made.

Dated at Portland, Oregon, this 3d day of February, 1931.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Said Petitioner and Plaintiff. [199]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely and legal service by copy of the within and foregoing petition for appeal is hereby admitted at Portland, Oregon, this 3d day of February, 1931.

HUNTINGTON, WILSON & HUNTINGTON,
CLARK & CLARK,
Of Attorneys for Defendant Above Named.

Filed February 4, 1931. [200]

AND AFTERWARDS, to wit, on the 4th day of February, 1931, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [201]

[Title of Court and Cause—Cause No. L.–10,535.]

ASSIGNMENT OF ERRORS.

Now comes Paul Herrmann, the plaintiff in the above-entitled court and cause, and contemporaneously with the making and filing of his petition for appeal herein, files therewith the following assignment of errors upon which he will rely upon his prosecution of the appeal in the above-entitled cause, from the judgment made by this Honorable Court on the first day of December, 1930, to wit:

I.

That the United States District Court for the District of Oregon erred in refusing and failing to rule and decide that said court had jurisdiction of the said cause vested in and imposed upon it by Act of Congress.

II.

That the United States District Court for the District of Oregon erred in holding and adjudging that said court had a discretion as to whether or not it would retain jurisdiction of said cause.

III.

That the United States District Court for the District of Oregon erred in rendering and entering said judgment of the first day of December, 1930, wherein and whereby plaintiff's complaint was dismissed.

IV.

That said United States District Court for the District of Oregon erred in refusing to retain juris-

diction of said [202] cause and in refusing to try and determine the issues thereof on the merits.

WHEREFORE the above-named plaintiff and appellant prays that said judgment of the District Court of the United States for the District of Oregon rendered and entered on the first day of December, 1930, be reversed and that a mandate of this court be entered remanding this cause to said District Court of the United States for the District of Oregon with the directions to retain jurisdiction of this cause and to try and determine the issues thereof on the merits.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Plaintiff and Appellant.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely and legal service by copy of the within and foregoing assignment of errors is hereby admitted at Portland, Oregon, this 3d day of February, 1931.

HUNTINGTON, WILSON & HUNTINGTON,
CLARK & CLARK,
Of Attorneys for Defendant Above Named.

Filed February 4, 1931. [203]

AND AFTERWARDS, to wit, on Wednesday, the 4th day of February, 1931, the same being the 64th judicial day of the regular November term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [204]

[Title of Court and Cause—Cause No. L.-10,535.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

On motion of E. B. Seabrook, one of the attorneys and of counsel for the plaintiff above named, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein on December 1, 1930, be and the same hereby is allowed, and that a transcript of the record and of all the proceedings and documents upon which said judgment was based, duly certified and authenticated, as provided by law, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be and the same hereby is fixed at the sum of $1,000.00.

Dated this 4th day of February, 1931.

JOHN H. McNARY,
District Judge.

Filed February 4, 1931. [205]

AND AFTERWARDS, to wit, on the 6th day of February, 1931, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [206]

[Title of Court and Cause—Cause No. L.–10,535.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Paul Herrmann, by his attorney, as principal, and Metropolitan Casualty Insurance Company of New York, a surety company duly authorized and licensed under the laws of Oregon, as surety, are held and firmly bound unto the above-named New York Life Insurance Company, the defendant in the above-entitled court and cause in the sum of $1,000.00, lawful money of the United States, to be paid to it and its respective successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, personal representatives, successors and assigns by these presents.

Sealed with our seals and dated this 4th day of February, 1931.

WHEREAS, the above-named Paul Herrmann, the plaintiff in the above-entitled court and cause, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of the District Court of the United States for the District of Oregon, rendered and entered in the above-entitled cause on December 1, 1930,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named Paul Herrmann, plaintiff herein, shall prosecute his said appeal to effect and answer all damages and costs if he fails to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

PAUL HERRMANN.
By C. T. HAAS, (Seal)
His Attorney of Record,
Principal.

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK.
By HERBERT F. WESTENFELDER,
Attorney-in-fact,
Surety.

[Seal of the Surety Company.] [207]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely and legal service by copy of the within and foregoing bond on appeal is hereby admitted at Portland, Oregon, this 6th day of February, 1931.

CLARK & CLARK,
Of Attorneys for Defendant Above Named.

The foregoing bond is approved both as to sufficiency and form this 6th day of February, 1931.

JOHN H. McNARY,
District Judge.

Filed February 6, 1931. [208]

AND AFTERWARDS, to wit, on the 9th day of February, 1931, there was duly filed in said court, a praecipe of plaintiff for transcript in words and figures as follows, to wit: [209]

[Title of Court and Cause—Cause No. L.–10,535.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said appellate court and especially including therein the following documents:

1. Petition for removal from state court.
2. Order of removal from state court.
3. Certificate of Clerk of state court.
4. Exhibits "A," "C," "D," and "E," attached to defendant's answer.
5. Second amended complaint.
6. Motion to dismiss.
7. Order dismissing action.
8. Notice of appeal.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Bond on appeal.
13. Citation.
14. This praecipe.

Omit all other papers and documents because they are unnecessary and immaterial to the question presented on appeal. [210]

Dated this 7th day of February, 1931.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Plaintiff.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely and legal service by copy of the within and foregoing praecipe for transcript of record is hereby admitted at Portland, Oregon, this 9th day of February, 1931.

CLARK & CLARK,
Attorneys for Defendant.

Filed February 9, 1931. [211]

AND AFTERWARDS, to wit, on the 10th day of February, 1931, there was duly filed in said court, a praecipe of defendant for transcript, in words and figures as follows, to wit: [212]

[Title of Court and Cause—Cause No. L.–10,535.]

PRAECIPE OF DEFENDANT FOR ADDITIONAL TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested and directed to prepare, certify and include in the record in the above-entitled cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, and

in addition to the papers and proceedings specified in the praecipe served and filed by the plaintiff, a certified copy of the following papers, documents and proceedings in said cause which are necessary to a consideration and determination of the cause in said appellate court, to wit:

1. The answer of the defendant to the amended complaint of the plaintiff herein omitted therefrom, and for the reasons hereinafter stated, the following:

(a) Exhibits "A," "C," "D" and "E" attached to said answer, being copies of the insurance policies upon which the several causes of action are based, for the reason that said exhibits are enumerated in the praecipe for transcript of record served and filed by plaintiff; and [213]

(b) Exhibit "B" attached to the answer of the defendant to the amended complaint herein for the reason that the same is identical with Exhibit 2 attached to the answer in the case of Henry Heine *versus* the above-named defendant, being number L.–10,465 pending in the above-entitled court, which was heard at the same time as this case;

(c) Exhibit "F" attached to said answer for the reason that the same is identical with Exhibit "D" attached to the affidavit of Dr. Arthur Burchard filed in the said Heine case;

(d) Exhibit "G" attached to said answer for the reason that it is identical with Exhibit "E" attached to said affidavit of Dr. Arthur Burchard;

(e) Exhibit "H" attached to said answer for the reason that it is identical with Exhibit "R" attached to said affidavit of Dr. Arthur Burchard;

(f) Exhibit "I" attached to said answer for the reason that it is identical with Exhibit "I" attached to said affidavit of Dr. Arthur Burchard;

(g) Exhibit "J" attached to said answer for the reason that it is identical with Exhibit "J" attached to said affidavit of Dr. Arthur Burchard;

(h) Exhibit "K" attached to said answer for the reason that it is identical with Exhibit "K" attached to said affidavit of Dr. Arthur Burchard.

(i) Exhibit "L" attached to said answer for the reason that it is identical with Exhibit "L" attached to said affidavit of Dr. Arthur Burchard; [214]

(j) Exhibit "M" attached to said answer for the reason that it is identical with Exhibit "M" attached to said affidavit of Dr. Arthur Burchard;

(k) Exhibit "N" attached to said answer for the reason that it is identical with Exhibit "T" attached to said affidavit of Dr. Arthur Burchard;

(l) Exhibit "O" attached to said answer for the reason that it is identical with Exhibit "A" attached to the affidavit of Walker Buckner filed in said Heine case.

2. Stipulation that answer to amended complaint should stand as answer to second amended complaint.

3. Reply to the answer of the defendant.

4. Affidavit of Walker Buckner filed in the above-entitled cause.

5. Notice dated September 25, 1930, signed by attorneys for the defendant giving notice to the attorneys for the plaintiff that in addition to the pleadings, files and records referred to in the mo-

tion to dismiss, the defendant would further rely upon the supplemental affidavits of Dr. Arthur Burchard and the supplemental affidavit of A. E. Clark made and filed in the aforesaid case of Henry Heine against the above-named defendant.

6. This praecipe.

That all of the foregoing papers, records and proceedings, in addition to those specified in the praecipe of the plaintiff, constitute the material record upon which the decision and judgment of the above-entitled court, from which an appeal is taken, were based.

The affidavit of Richard Kruse is omitted for the reason that it is made up of copies of the policies upon which the several causes of action contained in the second [215] amended complaint are based, and recitals that they are true copies of the policies, and copies of said policies are attached to the answer as Exhibits "A," "C," "D," and "E."

Dated February 9, 1931.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Defendant.

State of Oregon,
County of Multnomah,—ss.

Due service of the within praecipe is hereby accepted in Multnomah County, this 10th day of February, 1931, by receiving a copy thereof, duly certified to as such by W. M. Huntington, of attorneys for defendant.

C. T. HAAS,
Attorney for Plaintiff.

Filed February 10, 1931. [216]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 2 to 216, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Paul Herrmann is plaintiff and appellant, and New York Life Insurance Company is defendant and appellee; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and the praecipe for transcript filed by the said appellee, and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $33.45, and that the said appellant has paid $12.15 for the portion of the transcript requested by his praecipe for transcript, and that the appellee has paid the sum of $21.30 for the portion of the transcript requested by its praecipe for transcript.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 11th day of March, 1931.

[Seal] G. H. MARSH,
Clerk. [217]

[Endorsed]: No. 6406. United States Circuit Court of Appeals for the Ninth Circuit. Paul Herrmann, Appellant, vs. New York Life Insurance Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 14, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals of the United States, for the Ninth Circuit.

PAUL HERRMANN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

DESIGNATION OF APPELLANT OF PARTS OF RECORD TO BE PRINTED.

To the Clerk of the Above-entitled Court:

Appellant, pursuant to Rule No. 23, of the above-entitled court, does hereby make the statement that in the prosecution of the appeal of this cause he intends to rely only upon the following errors, which are set forth in the assignment of errors, to wit:

I.

That the United States District Court for the

District of Oregon erred in refusing and failing to rule and decide that said court had jurisdiction of the said cause vested in and imposed upon it by Act of Congress.

II.

That the United States District Court for the District of Oregon erred in holding and adjudging that said court had a discretion as to whether or not it would retain jurisdiction of said cause.

III.

That the United States District Court for the District of Oregon erred in rendering and entering said judgment on the first day of December, 1930, wherein and whereby plaintiff's complaint was dismissed.

IV.

That said United States District Court for the District of Oregon erred in refusing to retain jurisdiction of said cause and in refusing to try and determine the issues thereof on its merits.

The only legal propositions to be presented by appellant in the appeal are that the said District Court had jurisdiction of the cause vested in it by Act of Congress and was in duty bound to retain jurisdiction; had no discretion whatever as to whether or not it would retain such jurisdiction. And appellant does not raise any question whatever as to the proper exercise by said court of its discretion, in the event it had a discretion in the matter.

Inasmuch as the questions presented by appellant on appeal must necessarily be determined from the complaint and petition for removal, we request that

the following parts of the record only, and no others, be printed in the transcript of record, to wit:

(1) Petition for removal.
(2) Exhibits "A," "C," "D" and "E," attached to answer.
(3) Second amended complaint.
(4) Motion to dismiss.
(5) Judgment order dismissing action.
(6) Petition for appeal.
(7) Assignment of errors.
(8) Order allowing appeal.
(9) Bond on appeal.
(10) Citation on appeal.
(11) Praecipe for record.
Clerk's certificate.

Please omit from the printed transcript of record all other parts of the record because they are immaterial and unnecessary to a determination of the only questions presented in the appeal.

C. T. HAAS,
E. B. SEABROOK,
Attorneys for Appellant.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and timely service by copy of the foregoing document is admitted on this 11th day of March, 1931, at Portland, Oregon.

A. E. CLARK,
By MISS MAPLE,
Stenog.
Attorneys for Defendant.

[Endorsed]: Filed Mar. 14, 1931. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 6406.

PAUL HERRMANN,
Plaintiff and Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Defendant and Appellee.

DESIGNATION OF APPELLEE OF ADDITIONAL PARTS OF RECORD TO BE PRINTED.

To Hon. PAUL P. O'BRIEN, Clerk of the Above-entitled Court:

The appellee, pursuant to Rule No. 23 of this court, hereby requests that the following parts of the record be printed in this cause, in addition to the parts of the record designated by the appellant, which the appellee deems essential, material and necessary for the consideration of this cause upon appeal:

(1) All of the papers, documents and proceedings specified in appellee's praecipe for transcript (Transcript p. 212), being more particularly enumerated as follows:

(a) Answer of defendant (appellee) to amended complaint (Transcript, p. 26), omitting therefrom

Exhibits "A" to "O," inclusive, for the reason stated in appellee's praecipe for transcript.

(b) Stipulation that answer to amended complaint shall stand as answer to second amended complaint (Transcript, p. 188).

(c) Reply to answer (Transcript, p. 146).

(d) Affidavit of Walker Buckner (Transcript, p. 174).

(e) Notice by attorneys for defendant to attorneys for plaintiff, dated September 25, 1930, that in addition to pleadings, affidavits, etc., in this cause, defendant would rely upon the record in the case of Henry Heine vs. New York Life Insurance Company (Transcript, p. 192).

(f) Praecipe of defendant (appellee) for transcript of record on appeal (Transcript, p. 212).

Dated March 15, 1931.

B. S. HUNTINGTON,
W. M. HUNTINGTON,
ALFRED E. CLARK,
MALCOLM H. CLARK,
Attorneys for Defendant and Appellee.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due and legal service of the foregoing by receipt of a certified copy thereof, at Portland, Oregon, on this 17th day of March, 1931, is hereby admitted.

SEABROOK & SEABROOK,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Mar. 19, 1931. Paul P. O'Brien, Clerk.

No. 6406

United States
Circuit Court of Appeals
For the Ninth Circuit

PAUL HERRMANN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,
Attorneys for Appellant.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,
Attorneys for Appellee.

No. 6406

United States
Circuit Court of Appeals
For the Ninth Circuit

PAUL HERRMANN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

HON. R. S. BEAN, Judge.

C. T. HAAS and E. B. SEABROOK,

Attorneys for Appellant.

CLARK & CLARK,
HUNTINGTON, WILSON & HUNTINGTON,

Attorneys for Appellee.

STATEMENT

This is a companion case to the case of Henry Heine vs. New York Life Insurance Company, which is also on appeal to this Court. These two cases were argued together in the lower court and the essential facts are almost identical.

This case, like the Heine case, was commenced in the State Court, and was thence removed to the District Court upon petition of the defendant.

The causes of action are transitory in nature, being for damages for repudiation and breach of certain insurance contracts.

It appears from the verified petition for removal (page 4-6 Trans. of Rec.) that plaintiff is a citizen, resident and subject of Germany, and that defendant is a citizen of the United States, and that the controversy involves more than $3000.00, and that the District Court has jurisdiction of the cause. These facts being alleged by defendant cannot be disputed by it. Plaintiff conceded them to be true, so there was and is no issue on them.

The Second Amended Complaint (p. 10 T. of Rec.) contains four separate causes of action for damages for the repudiation and breach of four separate policies of life insurance issued by the defendant. The policies are set forth as Exhibits A, C, D and E, attached to the answer of defendant to the original complaint (pp. 128 to 168 T. of Rec.). In the second

amended complaint they are pleaded by reference to the said exhibits attached to the answer.

The first cause of action arises out of Exhibit A, a 20-year endowment policy issued to Ludwig Schnell on February 25, 1905, and numbered 1,554,478, for 9000 marks, payable in 20 years, on December 31, 1924. The policy also provides for the payment of annual proportionate shares of the profits of the company.

It is alleged that the insured survived the 20-year period and was alive on and after December 31, 1924; that said insured complied with the conditions of the policy and demanded the 9000 marks and certain unpaid profits, which had accrued, but that payment was denied and that defendant repudiated the contract and refused to be bound thereby. Because of such repudiation of the contract plaintiff seeks damages in American dollars.

The second cause of action arises out of a 20-year endowment policy issued on July 12, 1902, to Martin Loeb for 20,000 marks and numbered 1,501,182, which policy is Exhibit C attached to the answer.

As in the first cause, the insured survived the 20-year period and demanded payment of the insured sum as well as the accrued profits, but defendant repudiated the contract and refused to be bound thereby. Because of such repudiation plaintiff seeks damages in American dollars.

The third cause of action arises out of a 20-year endowment life insurance policy issued by defendant to Hermann Kaiser-Bluth on September 24, 1902, for 30,000 marks and is numbered 1,505,347, which policy is Exhibit D attached to the answer.

As in the preceding causes of action, the insured survived the 20-year period and demanded payment, but defendant repudiated the contract and refused to be bound thereby, and plaintiff seeks damages for such repudiation.

The fourth cause of action arises out of a 25-year endowment life insurance policy issued by defendant to Wilhelm Stadelmeyer on December 7, 1903, for 10,000 marks and is numbered 2,508,291, which policy is Exhibit E attached to the answer.

The policy provides that after it is in force for one full year the insured might convert said policy into a premium free policy for a certain amount to be determined from a table contained in said policy, which amount was to be paid on December 7, 1928. Said insured exercised his option to so convert his policy to a premium free policy for 600 marks, and defendant converted the same as agreed, whereby said insured became entitled to 600 marks on December 7, 1928. On December 7, 1928, insured was alive and demanded payment of the amount due under said policy, but defendant repudiated the contract and refused to be bound thereby. Because of such repudiation plaintiff seeks damages.

Each of these four causes of action have been assigned to plaintiff after the said repudiation by defendant of the contracts.

After the removal of the action to the Federal Court below, defendant filed a motion to dismiss the action for want of jurisdiction, or, as an alternative motion, to dismiss the same in the exercise of the court's discretion as to whether or not it would exercise jurisdiction. (P~~19~~ T. of Rec.).

The Court sustained said motion and dismissed the action, and plaintiff has appealed from such action of the lower court.

The assignments of errors are as follows:

I

That the United States District Court for the District of Oregon erred in refusing and failing to rule and decide that said Court had jurisdiction of the said cause vested in and imposed upon it by Act of Congress.

II

That the United States District Court for the District of Oregon erred in holding and adjudging that said Court had a discretion as to whether or not it would retain jurisdiction of said cause.

III

That the United States District Court for the District of Oregon erred in rendering and entering said

judgment of the first day of December, 1928, wherein plaintiff's complaint was dismissed.

IV

That said United States District Court for the District of Oregon erred in refusing to retain jurisdiction of said cause and in refusing to try and determine the issues thereof on the merits.

(P. 234 T. of Rec.).

ARGUMENT

The points involved on this appeal have been fully argued and presented in the said case of Heine vs. N. Y. Life Ins. Co., now pending before this Court, and we respectfully refer to Appellant's Brief filed in that cause and submit this appeal thereon

Respectfully submitted,

E. B. SEABROOK,
C. T. HAAS,
Attorneys for Appellant.

No. 6406

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL HERRMANN,
Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Appellee.

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon
HON. R. S. BEAN, JUDGE

C. T. HAAS AND E. B. SEABROOK,
Portland, Oregon,
Attorneys for Appellant.

HUNTINGTON, WILSON & HUNTINGTON,
CLARK & CLARK,
Portland, Oregon,
Attorneys for Appellee.

No. 6406

United States
Circuit Court of Appeals
For the Ninth Circuit

PAUL HERRMANN,
Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
Appellee.

Appellee's Brief

Upon Appeal from the United States District Court for the District of Oregon
HON. R. S. BEAN, JUDGE

C. T. HAAS AND E. B. SEABROOK,
Portland, Oregon,
Attorneys for Appellant.

HUNTINGTON, WILSON & HUNTINGTON,
CLARK & CLARK,
Portland, Oregon,
Attorneys for Appellee.

STATEMENT

Appellant, a resident of Heidelberg, Germany, brought this action as alleged assignee of four insurance policies issued prior to 1914 by appellee in Germany, payable in Germany, and in German marks.

Each of the insured was, at the time his policy was issued, a German resident and subject, and has since resided in that country (Trans. R. 201).

The first cause of action alleges that there accrued and became payable on the policy an endowment sum of 9,000 marks and certain stated sums as profits or accumulated dividends, payment of which was demanded and by appellee refused.

The second cause of action is similar to the first except as to the amounts of the endowment and the accumulated dividends.

The third cause of action, as alleged, is on a matured policy calling for 25,500 marks.

The fourth cause of action, as alleged, is on a matured policy calling for 600 marks.

Counsel for appellant seem to make some point that the causes of action are not based upon the insurance contracts, because it is remarked, on page 4 of Appellant's Brief, in substance, that the defendant repudiated the contracts and refused to be bound thereby and because of such repudiation the plaintiff is seeking damages in American dollars.

However, on the same page it is said that:

> "The first cause of action arises out of Exhibit A, a 20-year endowment policy issued to Ludwig Schnell," etc.; and

"The second cause of action arises out of a 20-year endowment policy issued on July 12, 1902, to Martin Loeb," etc.; and

"The third cause of action arises out of a 20-year endowment life insurance policy issued by defendant to Hermann Kaiser-Bluth," etc.; and

"The fourth cause of action arises out of a 25-year endowment life insurance policy issued to Wilhelm Stadelmeyer," etc.

Obviously, if no insurance pilicies had been issued there would be no foundation for any claims against the appellee, and of necessity the claims are based on the policies.

In *Die Deutsche Bank v. Humphrey,* 272 U. S. 517, 519, 71 L. Ed. 283, 385, the Court had before it a German mark obligation, and among other things said:

"A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here. *Davis v. Mills,* 194 U. S. 451; 48 L. Ed. 1067; 24 Sup. Ct. Rep. 692. See *Western U. Teleg. Co. v. Brown,* 234 U. S. 542; 58 L. Ed. 1457; 34 Sup. Ct. Rep. 955; 5 N. C. C. A. 1024. We may assume that when the bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by the German law — but we also assume that it was fixed in marks only, not at the extrinsic value that those

> marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability in marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things. See *Societe des Hotels le Touquet Paris-Plage v. Cummings* (1922), 1 K. B. 451 - C. A."

The defenses interposed to these several causes of action are similar to those in the companion case of *Heine versus New York Life Insurance Company,* No. 6405, on the docket of this court (Trans. R. 33, et seq.).

Appellant, as pointed out in the transcript and brief in the Heine case, has been very active in promoting litigation in the American courts on German insurance policies. So far as the record shows he has never been a policyholder in the appellee or any other American company, but has been a sort of miscellaneous assignee of German insurance claims, representation of which he has obtained. He has now pending in the Federal and State Courts in Oregon, brought by him as assignee, cases involving some 227 German policies.

The similar motion was made to dismiss this case as was made in the Heine case, supra. It was based on the same affidavits (Trans. R. 218), and the additional affidavit of Mr. Walker Buckner, in which he describes the policies, the circumstances under which, the

place where, and the German officers of appellee by whom, they were issued (Trans. R. 201).

The venue stipulations in the policies in this case are phrased somewhat differently than those in the policies in the Heine case (Trans. R. 203). However, the discussion of these venue sitpulations in insurance policies by Dr. Burchard in his affidavit filed in the Heine case, and the authorities which he there cites, apply to these venus stipulations equally with those involved in the Heine case (Heine, Trans. Rec. 206, et seq.).

We agree with counsel for appellant that the questions involved in this case are essentially like those involved in the Heine case, and for that reason we refer to, and submit this cause on, the brief of appellee filed in the Heine case.

Respectfully submitted,

B. S. HUNTINGTON,
W. M. HUNTINGTON,
ALFRED E. CLARK,
MALCOLM H. CLARK,
Attorneys for Appellee.